THE LAW

RELATING TO

DEMURRAGE

BY

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AND COURT-MARTIAL PROCEDURE," ETC.

PRICE SEVEN SHILLINGS AND SIXPENCE NET.

LONDON:
THE SYREN & SHIPPING, LIMITED
93 LEADENHALL STREET, E.C.
AND
MESSRS. SWEET & MAXWELL
CHANCERY LANE, W.C.
1907

INTRODUCTION

ALTHOUGH there is no diminution in the number of legal practitioners, there is an increasing desire on the part of business men to know something of "how they stand" in certain circumstances without having recourse to their solicitors. They do not, however, wish to go to the expense of costly Law books, and it is even possible some of them recognise that were they to do so, the last state would be worse than the first. What they desire is *the Law laid down plainly and concisely*, in volumes which are neither bulky nor expensive. This is particularly the position in Shipping affairs, where all concerned in the industry—be they Owners, Brokers, Merchants or Officers—are almost daily confronted with some legal problem or another, small perhaps in itself, but yet of importance to them.

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The first volume deals with Demurrage, an important subject on which there is at present no recognised text-book dealing exclusively with that branch of law, hence the initial volume of the series will appeal not only to men actually engaged in Shipping, but should be of service also to the legal community.

THE SYREN AND SHIPPING, LTD.

93 LEADENHALL STREET,
LONDON, E.C.
April, 1907.

PREFACE

THE law relating to Demurrage is a branch of mercantile law of the greatest importance to Shipowners, Charterers and Merchants. Although the subject is dealt with somewhat briefly in the books relating to the law of Merchant Shipping, yet so far as the author is aware, there is no separate treatise on this subject either in this country, America, or Australia. As the work contains many references to American decisions and as the law of demurrage is in those countries to all intents and purposes identical with our own, it is hoped that this treatise may be found useful to the lawyers and merchants of those countries. The present work has been prepared with special reference to making it acceptable in its scope and character to the practising lawyer, as well as to the commercial community in general. It is believed that this volume contains a reference to every decision on the subject, and to a number of the more important American decisions, and with very few exceptions, the facts of each case, with the decision of the Court, have been given fully, with quotations from the judgments of eminent Judges where it has been thought advisable in order to make the law clear. It has, however, been found impossible to reconcile in all cases the different decisions, as they appear somewhat contradictory; but this may be partly due to some particular fact having been omitted by the reporter, or some previous decision not having been brought to the notice of the Court.

It has been the aim of many authors to give, as succinctly as possible, the propositions decided by the Courts. This plan has not been adopted in the present work, it being in the opinion of the author the least serviceable in a legal treatise. The reports of cases are contained in hundreds of volumes, and are not always available to even the lawyer with a good legal library, whilst to the ordinary merchant they are wholly inaccessible. A treatise which epitomises in a line or two an important decision establishing a proposition of law often proves very unsatisfactory, and gives rise to a regret that more facts are not given. This is particularly so in a branch of law like that of Demurrage, where so much depends on the particular words used in the charter-party or bill of lading. Where a case is merely referred to without the facts, the facts may in most cases be found in another part of the book by referring to the table of cases.

J. E. R. STEPHENS.

2, ESSEX COURT,
TEMPLE, E.C.,
April, 1907.

CONTENTS

TABLE OF CASES

CHAPTER I.

DEFINITIONS.

DEMURRAGE.

Meaning of Demurrage.

Demurrage may be defined generally as a compensation paid by the shipper of goods to the shipowner for delay in taking his goods on board or out of the ship which carries them, whether under a charter-party (C./P.) or bill of lading (B./L.).[a] "The days which are given to the charterer in a charter-party either to load or unload without paying for the use of the ship are the lay days; then days are sometimes given also in favour of the charterer, which are called 'demurrage days.' These are days beyond the lay days, but during which he has to pay for the use of the ship in a fixed sum."[b] This "fixed sum" may be an agreed rate of compensation for every "day," "weather working day," or "hour," occupied in loading or unloading beyond the lay days. The word demurrage, however, besides its strict meaning of an agreed compensation for delay in loading or discharging a ship, also includes damages becoming due to the shipowner for the detention of the ship in breach of the charter-party or bill of lading; such damages may be in addition to demurrage proper, as when the ship is detained during all the agreed days on demurrage and longer, or they may be payable without any demurrage proper being due, if the charter-party does not provide for days on demurrage. The term is also used, perhaps improperly, of detention of ships due to collisions, and their claims for compensation against the wrongdoer.

[a] See per Lord Esher, M.R., in *Harris* v. *Jacobs*, 1885, 15 Q.B.D. 247.
[b] Per Lord Esher, M.R., in *Nielsen* v. *Wait*, 1885, 16 Q.B.D. 70.

Baron Cleasby in *Lockhart* v. *Falk*[c] said:—"The word 'demurrage' no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charter-party containing the clause in question we must collect what is the proper meaning to be assigned to it. When the charter-party contains no clause allowing demurrage at a specified rate at all, it has been held that the word 'demurrage' in the exemption clause applies to detention, and that the charterer is discharged as soon as a cargo is on board. This was the case of *Bannister* v. *Breslauer*."[d] The difference between the two chief senses of the word is generally only of importance in connection with the "cesser clause." Before demurrage can become due, then, either in the proper or in the popular sense, the "lay days," or time allotted for loading and unloading, as the case may be, must have expired.

Lay Days, Working Days, Running Days, etc.

Lay Days, Meaning of

The merchant usually covenants to load and unload the ship within a limited number of days after she is ready to receive the cargo and after arrival at the destined port, and to pay the freight in the manner appointed. These days are called "lay days." The number of lay days may be either expressly defined by the charter-party or determined by inference or reference from its terms—*e.g.*, "within so many days," or "according to the usual dispatch of the port," or "in the usual and customary time," or "at the rate of so many tons per day." If no reference or inference is to be found in the terms of the charter-party, the charterer is then bound to load or discharge, as the case may be, within a reasonable time.

Lord Esher, M.R., in *Nielsen* v. *Wait*[e] said:—"If the charterer keeps the ship beyond the 'lay days,'

[c] 1875, L.R. 10 Ex. 135. [d] L.R. 2 C.P. 497.
[e] 1885, 16 Q.B.D. 70.

when he pays nothing, and only the number of 'demurrage days,' he pays a fixed sum for demurrage. If he keeps the ship after that, it is a question of damages, and he does not know what he has to pay until the question is settled by a tribunal or by agreement. 'Lay days' are described in a charter-party in various ways; sometimes certain days are fixed for loading or unloading. If these days are described simply as 'days,' then, although they are not so called when they are said to be for loading or unloading, nevertheless they are 'lay days.' 'Days' and 'lay days' are really the same in a charter-party. 'Days' or 'lay days' may be calculated in a different manner—they may be described, and sometimes they are described, in a charter-party as days of so many working hours. Then the number of days is also fixed. The days may be described as 'working days.' Now, 'working days,' if that term is used in the charter-party, will vary in different ports; 'working days' in the port of London are not the same as working days in some other ports, even in England; but working days in England are not the same as working days in foreign ports, because working days in England, by the custom and habits of the English, if not by their laws, do not include Sundays. In a foreign port working days may not include Saints' days. If it is the custom or the rule of the foreign port that no work is to be done on the Saints' days, then working days do not include Saints' days. If by the custom of the port certain days in the year are holidays, so that no work is done in that port on those days, then working days do not include those holidays. Working days in an English charter-party, if there is nothing to show a contrary intention, do not include Christmas Day and some other days, which are well known to be holidays. Therefore 'working days' means days on which, at the port, according to the custom of the port, work is done in loading and unloading ships, and the phrase does not include Sundays. Merchants and shipowners have thought that this arrangement was not satisfactory to them, and that the lay days ought to be counted irrespectively of that custom, so that the charterer

Working Days in Port of London.

Working Days in other ports.

Meaning of Working Days.

Running Days.

should take the risk whether work is done on Sundays or holidays at the ports. They, therefore, introduced a new term, which is 'running days.' Now, 'running days' were put in really as a mode of computation to be distinguished from 'working days.' 'Days' include every day. If the word 'days' is put into the charter-party—so many days for loading and unloading—and nothing more, that includes Sundays and it includes holidays. 'Working days' are distinguished from 'days.' But I suppose and take it that there might be another dispute as to what 'days' would mean. If 'days' are put in, there is sure to come some discussion about what is the length of the day during which the charterer is obliged to be ready to take delivery or the shipowner to deliver because the length of days may vary according to the custom of the port. In some countries, for anything that I know, the custom of the ports may be to work only four hours a day, and if 'days' are put into the charter-party, there may be a dispute—although I do not say it would be a valid contention according to English law—whether the day included more than four hours. And merchants and shipowners have invented this nautical term, about which there can be no dispute. They have invented the phrase 'running days.' It can be seen what it means. What is the run of the ship? How many days does it take a ship to run from the West Indies to England? What is the running of the ship? The run of a ship is a phrase well known. What are 'running days'? It is a nautical phrase. 'Running days' are those days on which a ship, in the ordinary course, is running. It is true that when they are lay days they do not take effect under the charter-party until the ship has done running; but the parties are describing the days about which they are talking—namely, days in a port, according to the phraseology which they use with regard to a ship at sea. 'Running days,' therefore, means the whole of every day when a ship is running. What is that? That is every day, day and night. They are the days during which, if the ship were at sea, she would be running. That means every day. Now, Lord Abinger C.B. in

"Days" in a Charter-party may include Sundays and Holidays.

Meaning of "Run of the Ship."

Brown v. *Johnson*[f] pointed out that 'days,' inasmuch as they are working days, do, in point of fact, mean the same as 'running days,' because if so many days for loading and unloading are mentioned in a charter-party, not only working days are intended, but every day, including Sundays and holidays. Therefore, 'running days' comprehend every day, including Sundays and holidays, and 'running days' and 'days' are the same."

Custom may make "Days" equivalent to "Working Days."

But custom may make "days" equivalent to "working days" and exclude Sundays and holidays. Lord Eldon in *Cochran* v. *Retberg*[g] said:—"If no evidence had been offered, but I was to decide on the clause itself, I should have been of opinion that it meant 'running days': if that was so—if evidence of usage was not admissible, and the parties had made such a contract, they must abide by it, even though they could not perform it; as if the vessel had arrived on a holiday, and there had been holidays for the fourteen subsequent days. As the law, however, stands, usage may be admitted to establish the meaning of the words used in the margin of the bill of lading, whether the words 'days' used in it mean 'running days' or 'working days.' If this was the case of inland trade, this must mean 'working days,' as the law of this country prohibits working on such days as those which formed part of the fourteen days claimed by the plaintiff."

The context, too, may vary the ordinary meaning. In *Harper* v. *M'Carthy*,[h] A, B, C and D agreed to purchase a cargo of coals, in certain proportions, to be severally taken and received out of the ship by them respectively at the rate of forty chaldrons per day, and to settle their turns among themselves, and further agreed that in case of any loss or demurrage by not fixing on their respective turns, or by subsequent detention in working out the cargo, to hold themselves severally and respectively liable for their several and respective defaults; at the rate of forty chaldrons per day, the whole cargo would have been cleared in nine days, but in consequence of one of the days being wet

[f] 10 M. and W. 331; 11 L.J. Ex. 373.
[g] 3 Esp. 122.
[h] 10 M. and W. 258.

only five chaldrons were taken out on that day; and on the tenth day some of A's coals remained on board. It was held that "working days" only were within the meaning of the contract, and that as one day was wet, A was not bound to pay demurrage for the tenth day.[1]

In *Sorensen* v. *Keyser* (52 Fed. Rep. 163), the American Courts held that the term "working days" in maritime affairs means a calendar day on which the law permits work to be done. It excludes Sundays and legal holidays, but not stormy days.

"Running days" mean the same as "days" in a charter-party or bill of lading[j], and are not equivalent to consecutive days as "days running" would be, although the consequence of the stipulation is that, in the absence of custom to the contrary, the days or running days run consecutively, for the work must be carried on without a break. In *Nielsen & Co.* v. *Wait*,[k] Lord Justice Cotton says:—"It is said that the 'running days' mean 'consecutive days.' There is the fallacy of the argument. The meaning may be this, that in the absence of any custom the days of unloading would be consecutive; but what we have to consider is whether the stipulation that there are to be eight running days instead of only eight days, is an express term that the days for unloading shall be consecutive. In my opinion that is not the meaning of 'running days.' It is not ordinary English to say that 'running days' mean 'consecutive days.' 'Eight days running' would have borne the meaning, I think, of 'consecutive days'; but 'running days' are very different, and in my opinion nothing that has been quoted before us shows that the words 'running days' in the English language means necessarily 'consecutive days.' That may be the consequence; but it is the consequence only in the absence of any custom, because in the absence of an express stipulation, when the unloading once begins, it is the duty of the charterer to carry that on without a break, except so far as the law or custom requires that there should be a break. . . .

Do "Running Days" mean "Consecutive Days?"

Distinction between "Running Days" and "Days Running"

[1] See also *Jonasen* v. *Keyser*, 1901, 112 Fed. Rep. 443.
[j] *Brown* v. *Johnson*, 1842, 10 M. and W. 331.
[k] 1885, 16 Q.B.D. 77.

If 'running' was identical with 'consecutive' no custom could interfere in order to make the days not consecutive, which to my mind clearly shows that the term 'running' is not the same as another term for 'consecutive,' but merely that the consequences of the stipulation of so many days or so many running days will be that they are in the absence of custom to be consecutive—that is, that the work is to be carried on without a break."

Working Days.

"Working days" are those upon which work would ordinarily be done in the port. That is, excluding holidays usually observed therein; but not excluding days on which the usual working is merely prevented, as by bad weather.[1] And see per Lord Esher.[m] A holiday taken, according to custom, for the funeral of one of the men loading was not allowed.[n] If a local holiday is not, in fact, observed by those who are loading or discharging the ship, it will count as a working day.[1]

Lord Shand, in his judgment in *Holman* v. *Peruvian Nitrate Co.*[o] said:—"It might be maintained that the natural meaning of the word 'working days,' or as in the charter-party in this case 'per working day,' is to define or include only days on which work can be done by the charterer or his servants; but if this cannot be successfully urged, I see no other satisfactory construction of the term, except that it shall denote lawful days as distinguished from days or running days, terms which include Sundays and all holidays. On general and important considerations sanctioned by a long series of authorities it seems impossible to maintain successfully that 'working days' means days only on which it is possible for the charterer to get work done. It is against the true conception of the nature of a charter-party that a shipowner in letting the use of his vessel for hire should take the risks of the detention of the vessel which such a construction would infer. The charterer, who has to provide the cargo, alone can know or estimate the

[1] *Holman* v. *Peruvian Nitrate Co.*, 5 Sess. Cas. (4 ser.) 657.
[m] *Nielsen* v. *Wait*, 16 Q.B.D. p. 71.
[n] *Wood* v. *Keyser*, 87 Fed. Rep. 1007.
[o] 5 Sess. Cas. 4 ser. 657.

difficulties which may occur to affect the loading, and is the person properly able to ascertain and judge of the time required for its discharge. The shipowner, in agreeing to let his vessel, has not usually the same means of knowledge, and commonly protects himself against undue detention, and avoids speculation on the subject, by stipulating that the loading and discharging of cargo shall be begun and completed within a specified number of days or of working days, as the case may be. When the particular number of days or lawful days specified has elapsed a claim for demurrage arises." "The obvious convenience of such a rule," said the Court in *Thüs* v. *Byers*,[p] "in preventing disputes about the state of the weather on particular days, or particular fractions of days, and the time thereby lost to the charterer in the course of the discharge, makes it highly expedient that this construction should be adhered to, whatever may be the form of words used in the particular charter-party."

No division of a day without stipulation.

In *Commercial Steamship Co.* v. *Boulton*,[q] Lush J. said, on p. 349:—"There is no ground for saying that in the case of demurrage there can be any division of a day without stipulation to that effect. The inconvenience of such a proceeding would be very great, and the justice of the case seems the other way. It might be that by the detention of a few hours the ship had lost the whole day or a tide; and even if she could get out for another port for a fresh voyage very possibly she might not be able to get to the other place in time for loading. Therefore convenience and the language of the charter-party point the same way." And no doubt, when the work is to be done at a certain rate "per day," that must mean per working day.[r]

Working Day of twenty-four hours.

In *Rhymney Steamship Co.* v. *Iberian Iron Ore Co.*,[s] by a charter-party shipowners agreed to provide the charterers with ships for the carriage of 50,000 tons of iron ore during a period of twelve months. In the charter-party there was a clause as follows:—

[p] 1876, 1 Q.B.D. 249.
[q] 1875, L.R. 10 Q.B. 346.
[r] *Harper* v. *McCarthy*, 2 B. and P.N.R. 258.
[s] 81 L.T. 563.

"Charterers or their agents to be allowed 350 tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging . . . and to count from 6 a.m. of the day following the day when the steamer is reported, unless she be reported before noon, in which case time to count from notice of readiness . . . steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used." It was held by the House of Lords (affirming the judgment of the Court of Appeal) that the charterers were entitled to have twenty-four working hours to load or discharge each 350 tons. And this construction was approved by the House of Lords in *Forest Steamship Co.* v. *Iberian Iron Ore Co.*[t] Lord Halsbury, L.C., said:—"Surely the parties intended it to be understood as between themselves in respect of that matter that they were only using the word 'day' as meaning a day of twenty-four working hours. There is no such thing as a 'working day of twenty-four hours'; the thing is absurd; nobody supposes people to work for twenty-four hours. That phrase itself shows me that the parties intended to put together the periods of work for the purpose of ascertaining the gross number of hours, which, divided by twenty-four, would be the number of days in respect of which this provision shall apply."[u] In *Mein* v. *Ottmann*,[v] a charter-party provided that the ship was to be loaded in nine "working days," and to be discharged as customary "per like working day . . . loading time to count from 6 a.m. after the ship is at the Custom House and ready. . . . Demurrage over and above the said lying days at 16s. 8d. per hour. . . . the steamer to work day and night if required to do so" at the port of discharge. It was held by the Court of Session of Scotland that the "working day" at the port of loading was a day of twelve hours, and not a day of twenty-four hours, and consequently that the ship was on demurrage from 6 p.m. of the last lay day. Lord Trayner said:—"In the first place, I think it is wrong to say that a 'work-

Working Day of twelve hours.

[t] 1899, 3 Com. Cas. 316; 5 Com. Cas. 83.
[u] 5 Com. Cas. 85.
[v] 1904, 6 Sess. Cas. (5 ser.) 276.

ing day' consists of twenty-four hours—that period comprehends both a day and a night. Secondly, if the hours of night were to be comprehended in the 'working day,' I would expect it to be distinctly provided. This charter provides that if necessary at the port of discharge the steamer should 'work day and night.' This provision being made in regard to the discharge, and not in regard to the loading, leads to the conclusion that what was specially stipulated in regard to one and not to the other was not to be understood, but was excluded where it was not expressed."[w]

Working Day of twenty-four consecutive hours.

A charter-party provided that the ship was to be loaded and discharged "at the rate of 500 tons per working day of twenty-four consecutive hours (weather permitting), Sundays and holidays always excepted." It was held by the Court of Session of Scotland that a "working day of twenty-four consecutive hours" meant a period of twenty-four actually consecutive hours (*i.e.*, including the hours of night), and not an artificial period made up of twenty-four working hours (*i.e.*, excluding the hours of night).[x]

Weather-working days.

A charter-party provided that cargo should be loaded at a certain rate per weather-working day. On certain days, owing to bad weather, cargo could only be loaded for a few hours. It was held by Lord Russell of Killowen C.J. that the time so occupied in loading cargo was not to be reckoned against the charterers as a whole, but as a part only, of a weather-working day. When work is stopped by bad weather, but a substantial quantity of work is done, though not amounting to half a day, it is to be reckoned as half a day; where substantially more than half a day's work is done, though not amounting to a whole day of twelve hours, it is to be counted as a whole day; no smaller fraction than half a day should be taken in this calculation, and if the time worked is quite insignificant, it should not be charged at all.[y] When the claim is not in respect of days on demurrage, but for damages for

[w] 6 Sess. Cas. (5 ser.) 281.
[x] *Turnbull, Scott & Co.* v. *Cruickshank*, 1904, 7 Ct. of Sess. Cas. (5) 265.
[y] *Branckelow Steamship Co.* v. *Lamport*, 1897, 1 Q.B. 578.

improper detention, those damages should be calculated with reference to the actual detention that has taken place.

Part days counted as whole days.

In calculating the number of demurrage days to be paid for, a part of a day is counted as a whole one.[z] In *Angier* v. *Stewart*[a] a charter-party provided that the hire of a vessel should commence at noon of a certain day, and freight was payable at so much per calendar month, and "at and after the same rates for any part of the month," until her delivery to owners. On the day the hiring terminated she was delivered to her owners at 5.30 p.m. It was held by Denman J. that the charterers were liable for freight for the whole day, commencing at noon of the day of her delivery. So in *Hough* v. *Athyad*[b] where nine lay days were left for calling and discharging. Four and a half days were spent at the port of call, and five and a half at the port of discharge; the Court treated these as eleven days in all, allowing two days' demurrage. And for this purpose days are generally to be counted according to the calendar and not as periods of twenty-four hours. So that if the ship begins to discharge in the middle of the day, that is counted as a whole lay day, or demurrage day, as the case may be, if the inference from the circumstances is that the parties intended the time to be counted at all. But a charterer or consigner is not bound to take a part day as one of the lay days; he is entitled to have a full day, and may, therefore, refuse to begin to take delivery on a broken day. And usually, it seems, the day upon which the vessel gets to her dock or berth is occupied in making preparations, so that the lay days do not begin until the following morning.[c] By a charter-party, fourteen running days (Sundays and holidays excepted) were to be allowed for loading and unloading, and ten days on demurrage over and above the said lay days at fourpence per ton on the steamer's gross register tonnage per running

[z] *The Commercial Steamship Co.* v. *Boulton*, L.R. 10 Q.B. 346; 3 Asp. M.C. 111.

[a] 1884, 1 Cab. and Ell. 357.

[b] 16 Sc. L.R. 553.

[c] *The Katy* (1895) P. 56; *The Commercial S.S. Co.* v. *Boulton*, 3 Asp. M.C. 111; Cf. *Allan* v. *Johnstone*, 19 Sess. Cas. (4 ser.) 364; *Cornfoot* v. *Royal Exchange Assurance Corp.* (1903), 2 K.B. 363; (1904), 1 K.B. 40; *Brown* v. *Johnson*, 10 M. and W. 331.

day. Seven of the lay days were consumed at the port of loading, and the vessel arrived at the port of discharge on a Saturday, but was not cleared till 10 a.m., when the master gave notice to the defendants, the consignees of the cargo, that the vessel was ready to discharge. The defendants declined to receive the cargo on that day, but ultimately agreed, and the discharge took place on the Saturday for three hours—viz., from 1 p.m. to 4 p.m.—and the unloading was finally completed by 9 a.m. on the Monday week. It was held by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.J.J.), reversing the decision of the President, that though the defendants were entitled to a whole lay day, and were, therefore, not bound to take delivery on the Saturday, they, by agreeing to commence the discharge on that day, impliedly agreed to count that day as a lay day. Therefore, the seven lay days (excluding Sunday) expired on the following Saturday, and the defendants were liable to the plaintiff, the shipowner, for two days' demurrage. It was held also, affirming the decision of the President, that 'running days' meant 'calendar days,' from midnight to midnight, and not periods of twenty-four hours.[d]

In *Commercial Steamship Co.* v. *Boulton*[e] a charter-party contained the following clause:—"The loading and discharging the said ship to be as fast as the said steamer can work, but a minimum of seven days to be allowed the charterers, and ten days on demurrage over and above the said lying days, at £25 per day." Eight days, including one Sunday, were consumed at the port of loading. The ship arrived at the port of discharge on a Tuesday, but could not get to her berth till 8 a.m. on Wednesday. She then began discharging, and continued till 8 p.m., began again at 4 a.m. on Thursday and finished at 8 a.m. It was held that "lying days" meant working days, and Sunday was excluded. It was also held that the charterers were liable to pay two days' demurrage for the Wednesday and Thursday.

A charter-party of a steamship chartered to carry grain from the Black Sea provided that

[d] *The Katy* (1895), P. 56.
[e] 1875, 3 Asp. M.C. 111.

there should be "eleven running days, Sundays excepted, for loading and unloading, and ten days on demurrage over and above the said lay days at 6d. per ton per running day. The 1885 bills of lading to be used under this charter, and its terms to be considered part thereof." The printed bill of lading, 1885, as filled up by the master at the port of loading, contained this clause:—"*Five and a-half* (5½) laying days remain for discharging the whole cargo." The words and figures in italics were filled in by the master. In an action for demurrage against an onerous indorsee of the bill of lading, the shipowner contended that under this charter-party part of a day fell to be counted as a day, and that the shipmaster went beyond his power in stating the lay days remaining for discharge at more than five days. It was held by the Court of Session that the master was empowered by the charter-party to fill up the blanks in the bill of lading, and that the bill of lading as filled up was binding on the owners.[1] In that case Lord Adam (p. 367) said:—"The next question is, when did the lay days commence at the days of discharge? If there had been nothing special in this case, I do not say that I would not have been of opinion that the hour at which lay days must begin is twelve o'clock midnight. But this case must depend upon its own circumstances, and I think the letter of December 26th from the pursuers' agents is conclusive that the lay days must be held to have commenced at 6 a.m. on the 27th, or perhaps more properly at 7, when the working day commenced." Lord M'Laren, on p. 368, said:—"When it is ascertained that lay days have been exhausted, demurrage must, I think, be held to begin at the hour at which the lay days are exhausted, and the days of demurrage are reckoned as periods of twenty-four hours from that hour. Any surplus interval of time in excess of a number of full days is to be counted as an additional day. This point is established by a series of decisions of the English Courts, and cannot now be questioned. If it be settled, as I think we must hold it to be, that demurrage may begin at any hour of the

Hour at which Lay Days begin.

Hour at which Demurrage begins.

[1] *Allan* v. *Johnstone*, 1892, 19 Sess. Cas. (4 ser.) 364.

day, that can only be because the lay days begin and end at the same hour. This is not a matter of law, but of arithmetic. There is not, in my opinion, any such distinction, as was contended for by the appellants to the effect that lay days always begin at midnight. There is, however, a distinction of a different kind. It appears to me that if the ship arrives in port in the afternoon it would not be consistent with good sense that the obligation to load or unload should take effect at the instant when she is brought alongside of the quay. Men cannot be got to assist in the loading or unloading at the moment, and notice has to be given to the agent for cargo of the arrival of the ship. Accordingly, I understand that by custom, if a ship arrives after the hour of noon, the lay days are reckoned from the morning of the following day. But whether they are to be reckoned from midnight, or from the hour at which it is usual for loading or unloading to begin, is a point on which it is not necessary to give an opinion, because it is settled for the purposes of the present case by the letter of the owners' agents."

In a policy of marine insurance on a ship the insurance was described as being for a voyage to Algoa Bay, "and for 30 days in port after arrival," and as continuing "until the ship, with all her ordnance, tackle, apparel, etc., shall be arrived at, as above, upon the said ship, etc., until she hath there moored at anchor in good safety." The ship arrived in Algoa Bay and was there moored at anchor in good safety at 11.30 a.m. on August 12th. She remained in Algoa Bay until September 1st, and was there totally lost through perils insured against at 4.30 p.m. on that day. The Court of Appeal held, affirming the judgment of Bigham J., that the expression "30 days" in the policy meant thirty consecutive periods of twenty-four hours, the first of which began to run at 11.30 a.m. on August 2nd; and, therefore, that the insurance had come to an end before the loss occurred.[g]

A charter-party provided that the vessel should proceed to a loading berth in Leith docks, and there load

[g] *Cornfoot* v. *Royal Exchange Assur. Corp.* (1903), 2 K.B. 363; (1904) 1 K.B. 40.

in ten working days. Owing to the charterers having entered her for a crane berth, seventeen days passed after the master had intimated to the charterers that the ship was then lying at a loading berth ready for her cargo. It was held that though the charterers had a choice of loading berths, the lay days began to run from the date when the loading might have commenced.[h]

Days lost in putting up the gear of a vessel, preparatory to taking her cargo, being under the terms of the charter-party, a part of the duty of the merchant should be included in the running of the lay days.[i]

A charter-party provided that the vessel should proceed to Malta for orders which were to be given from London within twenty-four hours after receipt of notice or lay days to count. It was held, the orders not having been given within the time prescribed, that the lay days did not begin to count till the expiration of the twenty-four hours.[j]

The provision in a charter-party that the cargo is to be discharged "at the average rate of not less than — tons per day" means, in the absence of other words in the charter-party pointing to a different conclusion, that it is to be discharged in a number of days calculated at that rate, not in a number of hours calculated at that rate; and that if a fraction of a day is required for the completion of the discharge, the charterer is entitled to the whole of that day. Where the taking in of ballast during the process of discharge of cargo is necessary for the safety of the ship and of the cargo remaining on board, the fact that the taking in of the ballast delays the discharge of the cargo does not relieve the charterer from his obligations to complete the discharge within the stipulated time.[k]

It was held by Channell J. in *Nelson and Sons, Ltd.* v. *Nelson Line, Ltd.*,[l] and by Bray J. in *Whittall and Co.* v. *The Rahtkens Shipping Co., Ltd.*,[m] that where the charter-party contains a provision that "Sundays and holidays are excepted" and loading is proceeded

[h] *Dall'Orso* v. *Mason*, 1876, 13 S.L.R. 270 But now overruled. See *Tharsis Sulphur Co.* v. *Morel*, p. 115.
[i] *Wood* v. *Keyser*, 1897, 84 Fed. Rep. 688.
[j] *Bryden* v. *Neibuhr*, 1884, 1 Cab. & E. 241.
[k] *Houlder* v. *Weir* (1905) 2 K.B. 267, Distinguishing *Yeoman* v. *Rex* (1904) 2 K.B. 429.
[l] Jan. 15, 1907. [m] Feb. 28, 1907.

with on a Sunday and also on a holiday, the inference is that the parties agreed to treat both the Sunday and the holiday as lay days.

Where discharge to be at so many tons per day, time must be calculated accurately.

On the other hand, where the cargo is to be discharged at so many tons per working day, the time must be calculated accurately. By a charter-party it was provided that "the cargo shall be discharged at the average rate of not less than 210 tons per working day, weather permitting, the time to commence in accordance with the custom of the port; Sundays and all holidays, and time lost through strikes or locks-out of workmen, accidents, frosts, floods, rains, winds, rollers, or any cause whatever beyond the control of the consignees of the cargo, not to count as discharging time; demurrage to be paid of 4d. per net register tons per day, and pro rata, employed beyond the time allowed for discharging. The ship arrived at Bermuda with her cargo. The time allowed for discharging began to run at 6 a.m. on Monday, July 15th, and the discharge of the cargo was not completed till 3 p.m. on Monday, July 29th. It was admitted that, on the assumption that a fraction of a day was to be taken into consideration, the time allowed, at the rate of discharge mentioned in the charter-party, for discharging the cargo was a period of eleven working days and a portion of a twelfth day, ending at 9 a.m. on Saturday, July 27th. It was held by the Court of Appeal that, upon the true construction of the charter-party, the demurrage began to run at 9 a.m. on Saturday, July 27th, and not at the end of that day.[a] Mathew L.J. said, on p. 434:—"I can see no reason why the shipowners should not be entitled to have their ship discharged within the time which would seem to be clearly specified in the charter-party. The Crown contends that, because a fraction of a day must be employed in discharging the ship, the charterers were, therefore, entitled to the whole day for that purpose; so that, through negligence or indifference, they might allow valuable hours of the day to pass by, because they did not choose to proceed with the discharge of the ship, and then complete her discharge in the last hours of

[a] *Yeoman* v. *Rex* (1904), 2 K.B. 429.

the day. That contention appears to me most unreasonable, and quite contrary to the well-recognised obligations of a charterer towards a shipowner. It may be most important for the ship to be discharged as early as possible, for her future engagements and chances of employment may depend upon it.[o]

HOLIDAYS.

Holidays, Meaning of.

In *Niemann* v. *Moss*[p] a charter-party, by which it was agreed that a ship should receive on board a cargo of coals, and proceed with them to Constantinople (and or) Odessa, contained these words:—"The vessel to be loaded in Liverpool in fourteen days, and to be discharged, weather permitting, at not less than 25 tons per working day (holidays excepted), the days to commence on the ship's being in turn and ready to deliver; all days above the said days to be paid demurrage at the rate of £5 sterling per day." It was held that the words "holidays excepted" did not apply to the fourteen days within which the vessel was to be loaded; and, therefore, that although two Sundays occurred within the fourteen days, still there was the period of fourteen days only, within which she was to be loaded.

When "holidays" are expressly excepted, and the ship is foreign to the place at which the work is being done, there may be a doubt as to whether the holidays referred to are those at the port, or those usually observed by the ship or both. As the exception is for the protection of the charterer, it presumably relates to holidays at the port. On the other hand, as days upon which the crew fail to do their part in the work ought not to be counted against the charterer, it is not necessary to make the word include ship's holidays. Probably, therefore, ship's holidays should be counted as working days, if the crew are in fact ready to work, and if there is no holiday on shore. It was held by the Court of Appeal in *Denniston & Co.* v. *Zimmerman*[q] that the holidays and *fête* days contemplated by the charter-party and guarantee were those recognised as

[o] See also *Mein* v. *Ottmann*, 6 Sess. Cas. (5 ser.) 276.
[p] 29 L.J. Q.B. 206.
[q] 1894, 11 T.L.R. 113.

such in the district in which the colliery was situated; and that as the Eisteddfod, a great Welsh festival or assembly, was treated as a holiday or *fête* day in the district, it must be held to be such within the charter-party and guarantee.

Colliery Guarantee—Colliery Working Day.

Stipulations in Coal Charter-parties.

In the coal trades the conditions under which a ship is loaded are commonly determined by a document known as a colliery guarantee. The charter-party stipulates that the loading shall be done in a certain number of days "as per colliery guarantee"; and this guarantee is one obtained, or to be obtained, by the shipper from the colliery which is to supply and ship the coal for him. The effect is that the terms of the colliery guarantee as to the commencement and duration of the lay days, and the exceptions excusing failure to load, govern the obligations as between charterer and shipowner. A charter-party, dated July 16th, 1894, provided that the ship should proceed to a customary loading place in the Royal Dock, Grimsby, and there receive a cargo of coal "to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days." Demurrage to be at the rate of 4d. per ton per day. By a colliery guaranty, dated July 20th, 1894, the colliery company agreed with the charterers to load the ship with a cargo of coal "in fifteen colliery working days after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo (strikes of pitmen, etc., always excepted). Time not to commence before August 2nd. Time to count from the day following that on which notice of readiness is received, the said notice (in writing) to be handed to office . . . as soon as the ship is actually ready, as above stipulated, and not before . . . The ship to move to the spout and proceed with her loading whenever required to do so during the entire continuance of her lay days. Demurrage as per charter-party, but not exceeding 4d. per registered ton per colliery working day." The customary loading place for coal in the Royal Dock, Grimsby, was under a "spout,"

or shoot, through which the coal was shot on board the ship. Notice that the ship was ready was given on September 3rd. She had to wait her turn to get under the spout, and, but for delay, for which it was admitted the charterers were responsible, she could have been placed under it on September 17th. She did not, in fact, get under it until October 10th. The loading was completed on October 13th. In an action by the shipowner against the charterers for demurrage the Court of Appeal (Lord Esher M.R. and A. L. Smith L.J. affirming the decision of Mathew J.) (Kay L.J. dissenting) held that the provisions of the colliery guaranty as to loading were incorporated into the charter-party, and that the fifteen lay days commenced to run from the day after that on which notice was given that the ship was ready in the dock at Grimsby to receive the cargo.[r] A charter-party provided that demurrage at loading port should be "as per colliery guarantee." The colliery guarantee excluded from the loading time holidays, Sundays, and time lost through strikes; and provided that all holidays and full-day stoppages should be deemed to commence at 5 p.m. on the working day preceding, and to end at 7 p.m. on the working day following such holiday or stoppage. Further, that in case the vessel, whether on demurrage or not, could complete loading by 5 p.m. on the day preceding any Sunday, holiday or other stoppage of work, time should not count, either for loading or demurrage, until 7 a.m. on the day on which work should be resumed. Demurrage was to be at the rate of £13 "payable per colliery working day." After the expiration of the lay days a strike occurred at the colliery, which prevented the charterers from loading the vessel. In an action for demurrage it was held that the expression "colliery working day" did not exclude from the computation of demurrage ordinary working days on which, in fact, no work was done at the colliery by reason of the strike.[s] Lord Halsbury L.C. said[t]:—"I agree with the Chief Justice that the real

Colliery Working Day.

[r] *Monsen* v. *Macfarlane* (1895), 2 Q.B. 562.
[s] *Saxon Steamship Co.* v. *Union Steamship Co.*, 68 L.J. Q.B. 58, 914; 69 L.J. Q.B. 907; 83 L.T. 106, H.L.
[t] 69 L.J. Q.B. 910.

Colliery Working Day.

question in the case is, what is a 'colliery working day'? Does it mean only a day upon which the colliery is in fact working, or does it mean, what are ordinary working days in normal times and in normal circumstances? In the first place, I think on the ordinary construction of language, one would understand the words as the Chief Justice has understood them. A working day is, I think, in ordinary parlance to be understood as distinguished from holiday—including in that term a Sunday or some fixed and usual day for rest, and not for work, as a Sunday, Christmas Day, Good Friday and the like. But, besides what I have described as the ordinary and natural meaning of the words, there is the additional circumstance that, if the parties had intended what is now contended they meant, I see no reason why they should not have said in plain terms that by 'colliery working days' they meant days on which the colliery was actually working in fact. I am unable to follow the views of the Court of Appeal; they appear to recognise what I have described as the ordinary and natural meaning of the words, and I quite agree that the ordinary and natural meaning of words may be altered or modified by their use in a particular neighbourhood or in relation to a particular subject-matter. They adopt the Chief Justice's exposition of the words generally, but they add to that exposition—you must give the qualification as to how these words would be understood in the neighbourhood of the place where the parties were contracting. This would be quite intelligible if there were any evidence that the words were so understood like the custom of a port, or any other evidence which practically makes the use of particular words technical in the neighbourhood or in relation to the particular subject-matter. But the difficulty I have is that there is no evidence from which any such technical meaning can be gathered, and it certainly lies upon those who wish to give a technical meaning to plain language to establish that the words sought to be modified have acquired the meaning they insist upon."

In *Saxon Steamship Co.* v. *Union Steamship Co.*[n] the colliery guarantee was in the same form as the case of

[n] 69 L.J. Q.B. 907.

Clinton v. *Hickie* (No. 2) (1899, 4 Com. Cass, 292), and in both cases the Court of Appeal held that the clause beginning "For the purpose of this guarantee," applied to the time on demurrage, as well as to the lay days; so that the periods of seven hours before and after a Sunday or holiday were to be excluded from the demurrage. This was reversed by the House of Lords in *Saxon Ship Co.* v. *Union Steamship Co.* (*supra*).

By charter-party it was agreed that a steamship should proceed to one of several ports, as ordered by the charterers, and there receive "at the berth or berths pointed out by the charterers' agents, if required," a full cargo of coals. "The coals to be loaded in sixty hours, weather permitting, and Sundays and holidays excepted. . . . If longer detained, demurrage to be paid at 12s. 6d. per hour, unless detention arises from a strike, restriction or holidays . . . at any works, mine, or mines, with which the vessel may be booked, or any cause beyond merchant's control delaying the obtaining, providing, loading or discharging of cargo, lay days to count from the time the master has got ship reported, berthed, and ready to receive cargo, and given notice of same in writing to charterers or their agents." On the 13th November the ship arrived at the port to which she was ordered by the charterers. On the 14th November, at 6 a.m., a berth was open, and the master gave written notice to the charterers that the lay days commenced on that day at that hour; but as, owing to a dispute between the charterers and the owners of the colliery to which the vessel was booked, no cargo was at the port for her, the berth was given to another vessel, it being the rule of the port not to allow a vessel to be berthed until cargo was ready for her. Part of the vessel's cargo having arrived, she got a berth on 22nd November. On the 23rd November a strike began at the colliery to which she was booked, and her loading was in consequence suspended. The strike lasted till the 11th December at 3 a.m. The shipowners brought an action against the charterers for demurrage from 16th November at 6 p.m. till the completion of the loading.

Delay through Strike.

It was held by the Court of Session of Scotland (1) That the charterers had not proved that the failure to provide a cargo on the 14th November was due to a "cause beyond the merchant's control," and that the lay days commenced to run on 14th November, as the ship would have been berthed on that day but for the fault of the charterers in failing to have a cargo ready for shipment, and, consequently, that demurrage began to run on the 16th November at 6 p.m.; but (2) that the charterer's failure to load within the lay days before the strike did not deprive them of the benefits of the strike exemption, and that no demurrage was due from the period from November 23rd till December 11th, when the strike existed at the colliery. Lord Trayner, on p. 286, said:—"Days stipulated for by the merchant on demurrage are just lay days, but lay days that have to be paid for. If a charter-party provides that the charterer shall have ten days to load cargo, and ten days further on demurrage, loading within twenty days is fulfilment of the obligation to load. When the days on demurrage are not limited by the contract they will be limited by law to what is reasonable in the circumstances."[v]

Usual Colliery Guarantee.

Means Guarantee in use at place of Performance of Contract.

The phrase "Usual Colliery Guarantee" in a charter-party, and as determining the time for commencement of loading, means the Guarantee in use at the place where the contract is to be performed, such a Colliery Guarantee being an engagement by a colliery proprietor as to the time in which, and the conditions under which he will load a ship with coal. In *Shamrock Steamship Co., Ltd.*, v. *Storey*,[w] a charter-party provided that a ship should proceed to Grimsby and there load "in the usual manner according to the custom of the place" a cargo of coals, "the loading time to be 36 running hours on terms of usual colliery guarantee." The charter-party contained the following, amongst other exceptions:—"Commotions by keelmen, pitmen, or any hands striking work . . . or

[v] *Lilley* v. *Stevenson*, 1895, 22 Sess. Cas. (4 ser.) 278.
[w] 1899, 5 Com. Cas. 21.

other acts or causes beyond the freighters' control which may prevent or delay the loading of the steamer." The ship was in dock at Grimsby, and ready to load, on July 19th. By reason of the coal strike in Wales there was at that date an accumulation of shipping at Grimsby, and the ship was thereby prevented from getting a berth under a coal tip until July 29th, after which date the loading proceeded without further delay. In an action by the shipowners claiming demurrage, the Court of Appeal held that by the terms of "the usual colliery guarantee" in use at Grimsby, the time for loading did not begin to run until the ship was under the tip, and that the charterers were, therefore, not liable for demurrage.

So Near Thereto as she Can Safely Get.

"It appears from *Parker* v. *Winlo*,[x] *Bastifell* v. *Lloyd*,[y] *and Dahl* v. *Nelson*,[z] that when the charter-party provides that a ship shall go to a harbour named, or 'as near thereto as she can safely get,' the primary object is to get to the place named, and the alternative condition does not arise unless the cause which prevents the immediate arrival of the ship at the place named, is such that it cannot be got rid of by the shipowner by reasonable means and within a reasonable time, having regard to the nature and object of the voyage; and, further, that if the cause of detention be the arrival of the vessel during the low tides, her having to wait for the tides to increase is one of the ordinary incidents of navigation, and the shipowner must submit to the delay so occasioned."[a] It has been said that the meaning of this "must be that she should get within the ambit of the port, though she may not be able to enter it."[b] But this is not the natural effect of the words; and the later authorities seem to show that the shipowner's undertaking may be satisfied although the ship has not

[x] 27 L.J. Q.B. 49; 7 E. and B. 942.
[y] 31 L.J. Ex. 413; 1 H. and C. 388; 10 W.R. 721.
[z] 50 L.J. Ch. 411; 12 Ch. D. 568; 6 A.C. 38.
[a] Per North, J., *Horsley* v. *Price*, 1883, 52 L.J. Q.B. 605; 11 Q.B.D. 244.
[b] Per Lord Campbell in *Schilizzi* v. *Derry*, 24 L.J. Q.B. 197; adopted by Q.B.D. in *Metcalfe* v. *Britannia Ironworks Co.*, 1 Q.B.D. 613.

come within, or even near, the port, if she is prevented from doing so by an obstruction of a "permanent" character. By a charter-party made between the plaintiffs, who were shipowners, and the defendant, who was a London merchant, it was stipulated that the steamer E., belonging to the plaintiffs, should proceed to a port on the Baltic, load a cargo of deal timber, and proceed to London, S.C. Docks, or as near thereunto as she might safely get, and deliver the same on being paid freight at a rate therein specified; the cargo to be received at port of discharge as fast as steamer could deliver as above; ten days to be allowed on demurrage over and above the laying days at £30 per day. The S.C. Docks are private docks adjoining the port of London, and the defendant applied to the owners of the docks for a berth for unloading the ship, but was unable to obtain a berth in consequence of the crowded state of the docks. The plaintiffs brought the ship to London on the 4th of August, and applied at the dock gates for admission, but were refused, and accordingly moored the ship at the nearest safe place. The defendant made no other arrangement for unloading the ship, and the plaintiffs ultimately themselves unloaded the ship by lighters into the S.C. Docks, the unloading being completed on the 31st August. The plaintiffs alleged that it was the custom in the Baltic timber trade in the port of London for the importers of timber to provide berths for the discharge of the cargo, and the defendants having failed in doing so, they claimed demurrage and damages for the detention of the ship. The Court of Appeal held that the ship having been prevented from entering the S.C. Docks by a permanent obstacle, and the plaintiffs having brought the ship as near as she could safely get, the plaintiffs were entitled to demurrage and damages for detention.

Prevented by permanent obstacles not merely by obstacles endangering safety.

The provision in a charter-party that a ship is to be brought to a particular place, "or as near thereto as she may safely get," refers to the ship being prevented from getting to her primary destination by any permanent obstacle other than an accident of navigation, nor merely by an obstacle endangering

her safety.[c] In *Capper* v. *Wallace*,[d] by the terms of a charter-party the ship was to take in a full cargo at Bombay, and to proceed therewith to a safe port on the Continent between Havre and Hamburg as ordered, "or so near thereto as she might safely get." The cargo was to be brought to and taken from alongside at merchant's risk and expense. The ship was ordered by the charterers to Koogerpolder, in Holland. Koogerpolder is some distance up a canal, and the vessel with her full cargo on board drew too much water to proceed up the canal. No arrangement had been made by the charterers or consignees for taking delivery of any part of the cargo at the mouth of the canal. The portion of the cargo that required to be unloaded in order to enable the vessel to enter the canal was at least a third. The question arising under these circumstances between the ship owners and the charterers was which of them ought to bear the expenses of lightening the cargo from the mouth of the canal to Koogerpolder. It was held that, under the circumstances, the voyage under the charter-party ended at the mouth of the canal, and that consequently the charterers ought to bear the above-mentioned expenses. The Court said:—"It cannot, we think, be laid down as an inflexible rule that when a ship has got so near to the port as she can get, and the only impediment to proceeding further is overdraught, the master is under all circumstances entitled to consider the voyage at an end. He is bound to use all reasonable means to reach the port. The words 'as near thereto as she can safely get' must receive a reasonable and not a literal application. The overdraught may be such, and the cargo so easily dealt with, as that the surplus may be removed and the ship sufficiently lightened without exposing her to extra risk or the owner to any prejudice, and without substantially breaking the continuity of the voyage, and in such a case if the consignee is at hand to receive the surplus cargo and so relieve the overdraught, we are of opinion that it

[c] *Nelson* v. *Dahl*, 1879, 12 Ch.D. 568.
[d] 1880, 5 Q.B.P. 163

would be the duty of the master to lighten the ship and proceed to the port. This is the principle laid down by the Court of Session in the case of *Hillstrom* v. *Gibson*.[s] In that case, the master, who was bound to Glasgow, was unable to proceed beyond a point near Greenock with his full cargo on board. The consignees being at hand requested him to discharge what was necessary to lighten the ship and to proceed with the residue. The majority of the Court held this to be a reasonable request under the circumstances. The master complied with the request, and it was held that his going on to Glasgow was in the course of his duty, and that he could not claim demurrage for the time taken in reaching the port."

In *Schilizzi* v. *Derry*,[t] a ship had been chartered to proceed to Galatz or Ibrail, "or any other safe port on the River Danube not higher than Ibrail, or so near thereto as she may safely get," and there load a cargo. She proceeded in ballast to Sulina, at the entrance to the Danube, arriving there on the 5th November, 1853. She could not then go to Galatz, as there was not water enough to enable her to cross the bar of the river at Sulina; Galatz is ninety-five miles up, and Ibrail is twenty miles above Galatz. The master gave notice to the charterers' agents that he had arrived as near to Galatz as he could safely get, and that he was ready to receive cargo. But no cargo was sent, and after waiting off Sulina until December 11th, he sailed for Odessa, the nearest safe port to which the ship could go, and there loaded a cargo from other merchants. After the ship had left Sulina the water got deeper, and on and after the 7th of January, 1854, she might have crossed the bar, taken in a cargo at Galatz, and sailed out of the river with it; the charterers would in this case have been able to make a profit of £1,000 by sub-chartering her. It was held that the ship had not got as near to Galatz as she safely could within the meaning of the charter-party, and the charterers recovered damages for their loss.

[s] 8 Sess Cas. (3rd ser.) 463.
[t] 24 L.J. Q.B. 193.

Where obstacle neither a physical one nor absolutely permanent.

It is now established that a shipowner may have satisfied his undertaking to get as near as he safely can, although the obstacle which prevents his going farther may not be a physical one, nor one that is absolutely permanent.[g] In each case the question is whether the impediment could "be overcome by the shipowner by any reasonable means, except within such a time as, having regard to the objects of the adventure of both charterer and shipowner, was as a matter of business wholly unreasonable."[h]

In *Schilizzi* v. *Derry*[i] it was further contended that the shipowner was excused by the exception "dangers and accidents of the seas, rivers, and navigation of what nature and kind soever during the voyage." But the Court held that as the impediment was only temporary, the contract did not come to an end, and both parties remained bound by it when performance became possible.

It was held in *Allen* v. *Coltart*[j] that where a charter-party provides that the ship shall load with a cargo and proceed therewith to a port "to discharge in a dock as ordered on arriving if sufficient water, or so near thereto as she may safely get always afloat," the ship is only bound to discharge in the dock named if there is sufficient water there at the time the order is given.

Relates to Leaving as well as Entering the Port.

"So near thereto as she can safely get" has relation to the ship's safety not only in going into the port of loading, but also in getting away from it when loaded. A ship was chartered to Riga, viâ Bolderas, or as near thereto as she could safely get, and there load a full cargo. Both parties knew that a full cargo could not be loaded inside the bar at Bolderas, which is a bar harbour. The ship went to Bolderas, took in as much cargo as she could carry over the bar, and then left the harbour and came to another outside, as near as she could safely be, for the purpose of taking in the rest of the cargo. But the charterers refused to incur the expense of loading

[g] *Nelson* v. *Dahl*, 12 Ch.D. 568; 6 A.C. 38. Cf. *Castel* v. *Trechman*, 1 Cab. and E. 276.
[h] Per Brett L.J. in *Nelson* v. *Dahl*, 12 Ch.D. 593.
[i] 24 L.J. Q.B. 193. [j] 11 Q.B.D. 784.

any more cargo outside the bar, and the ship sailed with a part of the cargo only. It was held that the charterers ought to have completed the loading outside, and that the vessel need not have crossed the bar at all.[k]

When a vessel is chartered to proceed with cargo to a "safe port . . . as ordered or as near thereto as she can safely get, and always lay and discharge afloat," the master is not bound to discharge at a port where she cannot by reason of her draught of water, "always lie and discharge afloat" without being lightened, even if she can be lightened with reasonable dispatch and safety in the immediate vicinity of the port or in the port itself.[l]

A ship was chartered to proceed to Bilbao, "or so near," etc., and load a full cargo of ore, "when, where, and as directed." She was directed to a place at which only part of a cargo could be loaded, consistently with crossing the harbour bar, and the master was not requested to wait outside for more cargo. The charterers were held liable for dead freight.[m]

But in *Tweedie Trading Co.*, v. *New York, etc., Co.*,[n] a charter-party fixed the port of loading on a South American river, and the amount of cargo at 2,000 tons, 10 per cent., more or less, at the vessel's option. After reaching the port she elected to take 2,200 tons, but when 1,900 had been loaded, she refused to load more, because if she did she would be unable to cross a bar to the river fifty miles below. The charter-party required the charterer to furnish the cargo "within reach of the ship's tackles at ports of loading and discharge where steamer can always safely lie afloat, lighterage, if any, to be at expense and risk of cargo." Both parties had knowledge of the bars and of the stage of water usually prevailing at that season. It was held that such provision was not equivalent to one that the vessel should go to the specified port, or "as near as she can safely get,"

[k] *Shield v. Wilkins*, 1850, 19 L.J. Ex 238.
[l] The Alhambra, 1881, 6 P.D. 68, C.A.
[m] *Carbon Slate Co.* v. *Ennis*, 114 Fed. Rep. 269.
[n] 1903, 127 Fed. Rep. 278.

and could not be construed to require the charterer to lighter the additional 300 tons of cargo to the steamer after she had passed the bar, and that it was not liable for dead freight because of its refusal to do so.

Shipowner's Duty to bring Ship to agreed Place of Discharge.

The shipowner's obligation to bring the ship to the agreed place of discharge is generally qualified by the words, "at or so near thereto as she can safely get." This is understood to relate to obstructions which permanently prevent the ship from reaching her destination, or which would delay her for an unreasonable time. Temporary obstacles, causing delays which may be regarded as contemplated incidents of the voyage, will not excuse the owner. She must wait until they are removed, and then proceed.[o]

May Shipowner refuse to proceed when obstacle removed?

Ordinarily when the ship has failed to get to her destination, but has arrived at the nearest safe place to it, within the meaning of the charter-party, the merchant must take the cargo from alongside at that place, and must provide the necessary appliances for doing so there.[p] But if the difficulty of reaching the destination were merely one of tides, which might be surmounted after a short delay, it may be that the shipowner would be held bound to go on to the agreed place for discharging when that became practicable.[q]

In *Hayton* v. *Irwin*[r] a vessel was to deliver at a safe port, "or so near thereto as she can safely get." She was ordered to Hamburg and proceeded thither, but her draught prevented her getting farther up the river than Stade. The charterer refused to take delivery of any part of the cargo at Stade, and in answer to an action for the cost incurred in lightering up to Hamburg so much as was necessarily discharged, he alleged a custom of the port of Hamburg, by which he was not bound to take delivery anywhere

[o] *Parker* v. *Winlo*, 27 L.J. Q.B. 49; *Bastifell* v. *Lloyd*, 31 L.J. Ex. 413; *Metcalfe* v. *The Britannia Ironworks Co.*, 1 Q.B.D. 613; 2 Q.B.D. 423; *Castel* v. *Trechmann*, 1 Cab. and Ell. 276; *Nobel's Explosives Co.* v. *Jenkins* (1896), 2 Q.B. 326; *Treglia* v. *Smith's Timber Co.*, 1 Com. Cas. 360; *Reynolds* v. *Tomlinson* (1896), 1 Q.B. 586.

[p] *Reynolds* v *Tomlinson* (1896), 1 Q.B. 586; *Treglia* v. *Smith's Timber Co.*, 1 Com. Cas. 360. See per Lord Blackburn in *Dahl* v. *Nelson*, 6 A.C. at p. 43.

Horsley v. *Price*, 11 Q.B.D. 244.

[r] 5 C.P.D. 130

but at that place, and was not liable for any such expenses. It was held by the Court of Appeal that the alleged custom was inconsistent with the contract, for it required the ship to deliver at Hamburg whether she could get there or not. The charterer was bound to take delivery at Stade until the vessel was sufficiently lightened to enable her to proceed.

Daily Rate for Loading.

Frequently the time allowed is determined by the rate at which the cargo is to be loaded, or discharged. Thus, the expression may be that a day is to be allowed for each hundred tons of the cargo. In that case a full day is allowed for the last portion of the cargo, though it may be only a fraction of the agreed daily amount. But where a cargo was to be discharged "at the average rate of not less than 210 tons per working day," the time was calculated strictly, and demurrage began at the end of eleven days and a fraction.[a]

A clause allowing "one running day for every 410 tons up to 2,800 tons of grain, and for all quantities in excess 500 tons per day," was held to give one day for each 400 tons of the cargo up to 2,800 tons, and one day for each 500 tons of the excess beyond that.[b]

Usual Dispatch.

Where charterers contracted to load a cargo of coals on board "with usual dispatch," it was held, that they were bound to load the vessel with the usual dispatch of persons who have a cargo ready for loading at the port, and that they were liable for a delay caused by a severe frost which rendered unnavigable the canal along which coals were to be brought.[c]

By the terms of a charter-party the cargo was "to be discharged with all dispatch as customary, and ten days on demurrage over and above the said laying days at 6d. per net register ton per day." By the

[a] *Yeoman* v. *Rex* (1904), 2 K.B. 429.
[b] *Turner* v. *Bannatyne*, 9 Com. Cas. 83.
[c] *Kearon* v. *Pearson*, 1861, 7 H. and N. 386; 31 L.J. Ex. 1.

custom of the port of discharge, a dock company undertook the work of discharging cargo. By reason of a strike of the dock labourers the discharge of the cargo was delayed for four days. The Court of Appeal held that the effect of the charter-party was not to fix any definite time within which the cargo must be discharged, but to provide that it should be discharged with all reasonable dispatch, having regard to the circumstances and the manner of discharging cargo customary at the port of discharge; and therefore that the charterers were not liable to the shipowners in respect of the delay which had occurred in discharging the cargo.[v] In *Lyle Shipping Co.* v. *Cardiff Corporation*,[w] a ship was chartered to load a cargo of wood, to be carried to the port of Cardiff, and then to be "discharged with all reasonable dispatch as customary." The custom at the port of Cardiff was to discharge such a cargo into the wagons of certain railways that had access to the quay. The charterers arranged with one of these railways for the supply of wagons to take the cargo. Without any negligence on their part, but owing to stress of work at the port, by reason of which there was a deficiency in the number of wagons available, the discharge of the ship was delayed. In an action against the charterers for the detention of the ship, the Court of Appeal held that the charterers, having done their best to procure the appliances that were customarily used at the port for discharging such a ship, and having used them with proper dispatch, were not liable for the delay. (See also *Rodenacker* v. *May*, 1901, 6 Com. Cas. 37.) In *Fawcett and Co.* v. *Baird and Co.*[x] a charter-party provided that the cargo of timber should be discharged "with customary steamship dispatch as fast as steamer can deliver." The vessel arrived at West Hartlepool on July 15th, and the discharge began on that day. The method of discharge adopted at West Hartlepool is for the ship to discharge the cargo on to the quay, and for the receiver to load it from the quay on to

Lack of railway trucks.

[v] *Castlegate S.S. Co.* v. *Dempsey* (1892), 1 Q.B. 854.
[w] (1900), 2 Q.B. 638.
[x] 1900, 16 T.L.R. 198.

railway trucks which stood on rails parallel to, but not alongside, the ship. In this case the ship employed a stevedore to carry out the discharge, and the receivers of the cargo, the defendants, employed a different firm to load the timber, which was stacked on the quay by the ship's stevedore, into the railway trucks. The discharge was completed on Friday, July 21st. The plaintiffs alleged that it ought to have been finished on Wednesday, the 19th, and that the delay was due to the default of the defendants in not having sufficient men at work so as to clear the quay, whereby the quay became blocked, and the discharge from the ship was hindered. The defendants contended that the quay was never blocked, and that delay, if any, was due to an insufficient supply of railway wagons, for which the defendants said they were not liable. The defendants also called witnesses to prove that, according to the custom at West Hartlepool, the receiver is not bound to remove any of the cargo from the quay until the whole cargo has been put out of the ship and stacked on the quay, and that if the quay space at one berth is not sufficient for this to be done the ship must go to another berth. Kennedy J. held that the custom alleged was not proved, and, moreover, would be unreasonable; that there had one day been some delay owing to the defendants not having sufficient men at work, but that this delay was made up for by overtime; and that the plaintiffs had not proved that the defendants could have obtained more railway wagons.

Custom of the Port.

The House of Lords, in *Hulthen* v. *Stewart and Co.*,[7] held that a clause in a charter-party providing that the cargo is to be discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours of the port of discharge, but according to the custom of the port, is not tantamount to fixing a definite number of days or hours during which the discharge is to be completed. To create such a liability the days or hours must be specified in plain terms. This construction of the clause is not affected by a special exception in the

[7] 1903, A.C. 389.

case of a strike, a lock-out, or epidemics. Demurrage is not due if the discharge is effected with the utmost dispatch practicable, having regard to the custom of the port, the facilities for delivery, and all other circumstances not brought about by or within the control of the person whose duty it is to take delivery.

Prompt Dispatch.

A contract to give "prompt dispatch" has been held in America to require the charterer to have a berth ready at once. In a charter of a vessel to carry railroad ties a provision that from the time the vessel is reported ready not less than 1,500 ties shall be furnished per running day "for loading at port of loading, and prompt dispatch for discharging at port of discharge," was held by the American Courts to entitle the ship to demurrage for delay in unloading caused by other vessels being previously at the consignee's dock, though by the custom of the port vessels are obliged to take their turn.[a]

Custom of Port.

Custom of a port was held not proved by the practice of one firm during a period of thirty years. A ship loaded a cargo of ash and bones, and mixed among them horns, hoofs, and skins, to be carried and discharged according to the custom of a port of the United Kingdom. Aberdeen was the port of discharge, whither the goods were consigned to the pursuers, whose firm was the only firm doing this class of business. They demanded that the bones should be delivered separately from the horns and hoofs. They failed to prove a custom to that effect. The ship proved that the cargo had been offered for shipment without separation. It was held that the ship was entitled to deliver the cargo in bulk, and that the consignees were liable for demurrage for the detention caused by separating the cargo.[a]

Usual and Customary Time.

In *Rogers* v. *Forrester*[b] it was held that if the freighter of a ship employed to bring a cargo of wine into the port of London covenant to unload her "in the usual and customary time" at her port of discharge he is not liable for the detention of the ship in the London Docks, if she is there unloaded in her turn

[a] Ten thousand and eighty-two Oak Ties, 1898, 87 Fed. Rep. 935.
[a] *Clacevitch* v. *Hutchinson*, 1887, 25 S.L.R. 11.
[b] 1810, 2 Camp. 483.

into the bonded warehouses. Lord Ellenborough said:—"What is the usual and customary time for a ship to unload a cargo of wines in the port of London? According to the evidence—when she gets a berth by rotation and the wines can be discharged into the bonded warehouses."

If by the bill of lading of a cargo of brandy brought into the London Docks, no time is stipulated within which it shall be unloaded, the implied contract on the part of the consignee is to discharge the ship in the usual and customary time for unloading such a cargo—which is the time within which the brandies can be unloaded in the docks into the bonded warehouses. Therefore, the consignee is not, under these circumstances, liable to make compensation to the owner of the ship, in the nature of demurrage, for any delay occasioned by the crowded state of the London Docks, although the cargo might have been landed sooner if the duties had been immediately paid.[c] In *Ford* v. *Cotesworth* Blackburn J. delivering the judgment of the Court, said:—"We think that the contract which the law implies is only that the merchant and shipowner should each use reasonable dispatch in performing his part. That such was the opinion of Lord Tenterden appears to be implied from his ruling in *Rogers* v. *Hunter*[d] as to what was the obligation of the holder of a bill of lading. If this be so, the delay having happened without fault on either side and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls."

Crowded State of Docks.

There is no proved custom at the port of Sharpness that a steamer with a cargo of wood under a Baltic Steam Bristol Channel Charter-party (containing provisions that "Cargo to be loaded and discharged with the customary steamer dispatch of the port, and in the ordinary working hours thereof," and "The usual custom of the wood trade of each port is to be observed by each party in cases where not specially expressed") is properly discharged if the cargo is dis-

Custom of Wood Trade.

[c] *Burmester* v. *Hodgson*, 1810, 2 Camp. 488. [d] 1868, L.R. 4 Q.B. 137. [e] M. and M. 65.

charged at an average rate of 90 standards per weather working day. Such a custom would be unreasonable.[f]

Duty of Charterer to provide means of Discharge.

In *Postlethwaite* v. *Freeland*[g] the House of Lords held that the duty of providing, and making proper use of, sufficient means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination, and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charter-party, and by the circumstances of the case. If, by the terms of the charter-party, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time. Lord Hatherley said:—"When the covenant merely engages that the merchant shall with all dispatch according to the custom of the port, unload the vessel, he will fulfil his contract if he employs all the usual methods of dispatch at the port."[h]

Where a charterer agreed to load a vessel, when it arrived at a certain port, with a cargo of coals in the customary manner, and the question at the trial was, whether he had so loaded the vessel within a reasonable time, it was held, that the jury were rightly directed not to take into consideration a delay occasioned by a strike among the colliers and a dispute with a railway company, along whose line the coal had to be brought to the port for shipment, these not being matters contemplated by either party when the charter-party was made.[i]

By a charter-party, the master of the plaintiff's ship engaged to receive on board a full cargo of coal and to deliver the same as per bill of lading, "to be loaded with the usual dispatch of the port . . . or if longer detained to be paid 40s. per day demurrage." The defendants engaged to load her "on the above terms."

[f] *Sea Steamship Co.* v. *Price* (1903), 8 Com. Cas. 292. [g] 1880, 5 A.C. 599.
[h] See also the judgment of Lord Blackburn, 5 A.C. 613-622.
[i] *Adams* v. *Royal Mail Steam-Packet Co.*, 1858, 5 C.B. N.S. 492; 28 L.J. C.P. 33; 7 W.R. 9.

By a memorandum at the foot of the charter-party she was to load in the B. or W. Docks, by a regulation of which coal agents were not to have more than three vessels loading and to load at the same time. The plaintiff's ship would have been loaded without delay had it not been for the fact, which was unknown to the plaintiff at the time he entered into the charter-party, that the defendants acted as their own coal agents, and that they had at the time three ships loading in the docks, and ten other charters in their books which had priority over the plaintiff's ship. By reason of the incapacity, under which the defendants had so placed themselves, the loading could not be commenced until thirty days after the ship was ready. It was held in an action for demurrage that the defendants had contracted that they would load with the usual dispatch, and that it was no answer that they were unable to do so, or that the plaintiff knew it.[j]

A charter-party provided that the ship should proceed to a port, and there load from the factors of the charterers a cargo of "coal, taking her turn with other steamers," and receive "prompt dispatch in loading." The charterers employed the persons at the port of loading who were employed to load other ships, and the ship was loaded in her turn, but by reason of an insufficient supply of coal, the ship was delayed. It was held that the charterers were responsible for the delay.[k]

Usual and Customary Manner.

Where by the terms of a charter-party the ship is to deliver the cargo "in the usual and customary manner," the obligation which attaches is only that the merchant and shipowner shall each use such reasonable dispatch in performing his part, and there is no implied contract that the discharge shall at all events be performed in the time usually occupied at the particular port. Therefore, where, owing to a threatened bombardment, the authorities at the port of discharge refused for several days to allow the discharge of cargo to proceed, so that during those days neither party to

[j] *Ashcroft* v. *Crown Orchard Colliery Co.*, 1874, 43 L.J. Q.B. 194; L.R. 9 Q.B. 540.

[k] *Elliott* v. *Lord*, 1883, 52 L.J. P.C. 23; 48 L.T. 542; 5 Asp. 63.

the contract could perform his part of the contract, it was held that the loss from delay must fall on the shipowner.[1]

"Load in the usual and customary manner" seems to apply only to the mode of loading when the vessel has arrived at the loading berth, and to have no reference to a detention outside the loading place.[m]

Where a charter-party provides for discharge "in the manner and at the rate customary at each port during the customary working hours and, if the ship be further detained through the fault of the charterers, ten days on demurrage over and above the said laying days at twenty pounds per day," the shipowner cannot land the goods subject to lien under the provisions of the Merchant Shipping Act, 1894, until it is evident that the ship cannot be discharged within the time allowed.[n]

By a charter-party all liability of the charterer was to cease on completion of loading, provided the value of the cargo was sufficient to satisfy the lien which was thereby given for (*inter alia*) demurrage under the charter-party. The ship was to be loaded as customary, and to be discharged as customary at the average rate of not less than 100 tons per working day, from the time she was in berth and ready to discharge, and notices thereof given by the master in writing. Demurrage to be at the rate of £20 per day. In an action by the owner to recover from the charterer damages for detention at the port of loading, it was held by the Court of Appeal that the word "demurrage" in the lien clause did not cover damages for undue detention at the port of loading, and that, therefore, the cesser clause did not exempt the charterer from liability for the delay.[o]

Undue Detention

As Fast as Ship can Deliver.

Discharge of cargo "as fast as steamer can deliver as customary," or "as fast as she can deliver," means as fast as reasonably possible in a business sense.

[1] *Ford* v. *Cotesworth*, 1870, L.R. 5 Q.B. 127; 38 L.J. Q.B. 52; 39 L.J. Q.B. 188; 10 B. and S. 991.

[m] *Tapscott* v. *Balfour*, L.R. 8 C.P. 46; 42 L.J. C.P. 16; *The Alne Holmes*, 1893, P. 173; 62 L.J. P.D. 51; 68 L.T. 862.

[n] *Smailes* v. *Hans Dessen*, 94 L.T. 492.

[o] *Dunlop & Sons* v. *Balfour*, 1892, 1 Q.B. 507. See *Gardiner* v. *Macfarlane*, 1893, 20 Sess. Cas. 4 ser. 414. *The Nifa*, 1892, P. 411.

By a charter-party a steamer's cargo was "to be discharged as fast as steamer can deliver after being berthed as customary." The cargo was pig-iron, and the custom of the port of discharge was to deliver by steam cranes into wagons brought alongside working day and night. It was a rule of the port that no pig-iron should be laid on the quay. The supply of trucks was restricted to those of two railway companies whose lines had access to the quay. On arrival of the vessel due notice was given by the consignees to the railway company by whose line the cargo was to be forwarded, but delay was occasioned through failure of the railway company to supply sufficient trucks. It was held by the Court of Session that the consignees were not liable in demurrage.[p] Lord Justice Clerk said:—"Now one of the rules of the port of discharge selected—Glasgow General Terminus—was that no cargo should be laid down on the quay, but that all cargo should be delivered into trucks. That being so, and there being no trucks available, or not sufficient trucks available, I think a delay occurred for which neither party was responsible to the other. The whole obligations of giving and taking discharge was subject to the possible delay arising from deficiency of the customary means of unloading. I can, therefore, see no distinction between the present case and that of *Postlethwaite* v. *Freeman*."

Insufficient Railway Trucks.

In *Good and Co.* v. *Isaacs*[q] a charter-party provided that the cargo was "to be discharged as fast as steamer can deliver, as customary, and where ordered by the charterers." The Court of Appeal held, that the word "customary" must be taken to refer to the discharge and delivery by the ship, rather than to the taking delivery by the charterer or consignee, and to mean that the discharge and delivery must be as fast as the custom of the port would allow.[r]

Meaning of Customary.

The cases seem to decide that the words "As fast as ship can deliver" put no obligation on the charterer beyond that of being reasonably diligent. So that he is excused from taking delivery by obstacles which prevent his doing so, though they may not prevent the ship from giving delivery.

[p] *Wyllie* v. *Harrison*, 1885, 13 Sess. Cas. (4 ser.) 92. [q] 1892, 2 Q.B. 558.
[r] See also *The Jaederen*, 1892, P. 351; 61 L.J. P.D. and A. 89.

This appears to have been the case in *Hulthen* v. *Stewart*.[s] In that case the ship was to load a cargo of timber and therewith "proceed to London, or so near thereunto as she may safely get," and deliver it; "the cargo to be loaded and discharged with customary steamship dispatch, as fast as steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports." The ship arrived at Gravesend on October 12th, and was ordered to the Surrey Commercial Dock to discharge. That dock being crowded, the ship could not enter until October 18th, and could not get a discharging berth at the quay until October 20th (Saturday). The discharge began on October 22nd, and was completed on October 29th. With clear ground on which to discharge it could have been completed in five or six days; but the quay was partially encumbered with other goods, and that caused some delay. Discharge into lighters in the dock was not possible, because lighters could not be got by the charterers. The shipowners contended that the words "with customary steamship dispatch as fast as steamer can deliver" in effect fixed a time within which the discharge was to be done. But the House of Lords held that the words had not that effect. "The words used do not specify, or even, I think, point to a definite period of time. What they do point to is the discharge of the cargo with the utmost dispatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in existence at the time, not being circumstances brought about by the person whose duty it is to take delivery, or circumstances within his control."[t]

Customary Steamship Dispatch.

In *Temple* v. *Runnalls*[u] a charter-party contained the following clauses. "The cargo to be loaded and discharged as fast as steamer can receive and deliver during usual working hours (Sundays and holidays excepted). The time for loading and discharging to

As Fast as Steamer can Deliver.

[s] 1903, A.C. 389. [t] Per Ld. Macnaghten, 1903, A.C. 392.
[u] 1902, 18 T.L.R. 822.

count from the time the ship arrives at the loading and discharging ports respectively in usual working hours." The charter-party was in a printed form, and the word "ports" was written in instead of the printed word "berths." Demurrage was to be at the rate of 10d. an hour. The vessel arrived at Newlyn on Thursday, April 11th, and was moored inside the harbour at 3.15 p.m. Loading was commenced on Saturday at 8 a.m., and was finished at 2.15 p.m. on Thursday, April 18th. The plaintiffs alleged that under the charter-party she ought to have finished loading on Saturday, April 13th. The defendant was the one shipper of stone from Newlyn, and there was only one berth at that port at which this vessel could be loaded in the manner usual at Newlyn. When the plaintiffs' ship arrived the berth was occupied by another ship, into which the defendant was loading stone. The stone at Newlyn only came from three quarries, owned by the defendant, and situate at distances varying from one-half to one and a-quarter miles from the harbour, to which the stone was always carted by means of hired horses and carts. Evidence was given that at Newlyn the work of loading stone was made more difficult in April, May, and June in each year by reason of the mackerel fishery, to which were directed many of the carts that would otherwise be available for carting the stone, and the skipper could only get eight or nine carts instead of the usual number—namely, thirty. Stone was not kept stored on the quay. In consequence of the above circumstances the loading was not completed until Thursday, the 18th. Mr. Justice Bigham came to the conclusion that the defendant had done all he reasonably could to get every available cart, and he placed the berth at the disposal of the ship as soon as he could. His lordship held that the obligation of the defendant to load did not commence until it was possible to load. He therefore gave judgment for the defendant. This decision was affirmed by the Court of Appeal.[r]

A clause in a charter-party was as follows:—"The cargo to be loaded . . . with customary steamship

[r] Cf. *Macbeth* v. *Wild*, 1900, 16 T.L.R. 497.

dispatch, as fast as the steamer can receive . . . during the ordinary working hours . . . but according to the custom of the port." Mr. Justice Kennedy said:—"The steamer was to get the quickest dispatch according to its capacity for receiving cargo, but its owners could only require that the customary appliances should be used. The words 'but according to the custom of the port' did not really add anything. They did not fix the time for loading, and were perhaps inserted in view of the words, 'as fast as the steamer can receive,' in order that it might be clear that these words were in each case to be interpreted according to the circumstances of the particular port in question. If a custom had been proved in this case that fifty standards of timber were to be treated as an average amount, satisfying under the charter-party both the ship and the shippers, that custom would be excluded by the charter-party being contrary to the words, 'as fast as the steamer can receive . . . but according to the custom of the port.' But such a custom had not been proved. If the question of custom failed, was there a failure to give to this steamer, under the circumstances and with the ordinary appliances, customary dispatch? By undisputed usage, and by the practice in this particular case, the shipper understood to supply the men to load the timber; that duty he undertook as part of his bargain. If, therefore, he could have supplied two gangs of men where he had only supplied one, he was bound to do so, and no reason had been given why he should not have supplied two gangs continuously; for this failure he was responsible."[w]

In *Hine* v. *Perkins*[x] a charter-party provided that the vessel should "discharge as fast as she can deliver in ordinary working hours; any lighterage at port of discharge to be at charterer's risk and expense; vessel to provide sufficient steam to run all cargo winches at one and the same time." The vessel had four hatches from which she could discharge, but was sent to piers, where she could use but three at most.

[w] *Metcalfe* v. *Thompson*, 1902, 18 T.L.R. 706. See also *The Arne* (1904), P. 154.

[x] 1893, 55 Fed. Rep. 996.

It was held that she was entitled to discharge from all four, and the charterers were liable for the delay caused by discharging from fewer. The Court distinguished the case of *The Glenfinlas*.[7] The learned judge said:—"The case of *The Glenfinlas* is referred to as sustaining the contention of the respondents that the ship was entitled to discharge from two hatches only. In that case the provision of the charter-party was, as in this case, that the vessel should 'be discharged as fast as she can deliver.' It was held that evidence of a practice of the port, as respects delivery of cargoes of chalk (with which the *Glenfinlas* was loaded) 'could not control the plain intent of the charter to provide for a rapid discharge during working hours.' In the opinion in that case it was stated that 'vessels of her size use at least two hatches, and under the charter the *Glenfinlas* was entitled to do so, despite the evidence of a contrary practice having reference to smaller vessels, and smaller cargoes.' But in that case, although the *Glenfinlas* had four hatches, her owners made no claim to work more than two, and for ought that appeared in the case she was not equipped to work more than that number. Deciding only the precise point raised in that case, we held that if the ship was prepared to work two hatches, and claimed the right to do so, she was entitled to discharge therefrom, under such a charter-party, during ordinary working hours, and on ordinary working days, despite any custom. In the case at bar, where the ship was equipped with proper winches and steam, and ready to work four hatches, we hold in like manner, that she was entitled to discharge therefrom, such discharge being in strict conformity to the agreement of the parties, as expressed in the charter-party. We are satisfied from the evidence that the ship demanded more rapid discharge than she received, and was entitled to demurrage for any detention subsequent to the lay days necessary to effect her discharge from four hatches."[8]

A chartered vessel reached the port of New York and proceeded to the designated pier at 8 a.m., Decem-

[7] 48 Fed. Rep. 758. [8] 55 Fed. Rep. 998.

ber 10th, but, finding the berth occupied, she sought an anchorage. The charterers were notified by 11 a.m. that she would be ready to unload at 7 a.m. the next day. Early in the morning, December 11th, she proceeded to the pier, and, finding the berth still occupied, she went back to her anchorage. The berth was ready for her by 11 a.m., but she did not return until evening, and commenced to unload on the 12th. The American Courts held that, as the charterers provided a berth within twenty-four hours after notice of arrival, they were not liable for the delay.

In *Maclay* v. *Spillers and Baker*[a] a bill of lading provided that the goods were to be received by the consignees "immediately the vessel is ready to discharge and continuously at all such hours as the Custom House authorities may give permission for the ship to work, any custom of the port to the contrary notwithstanding." The Court of Appeal held that immediately the ship was ready to discharge there was an absolute obligation on the consignee to receive the cargo continuously, even though the appliances of the port were not then available.

In Regular Turn.

Meaning of "In Regular Turn."

The ship is sometimes, as in coal charters, to be loaded or unloaded "in regular turn," or "in regular turns of loading;" or other similar expressions are used. If in such cases the ship is ready, at the proper place, and does not get her turn, the charterer is liable for her detention. The meaning of "in regular turn" must depend upon the manner in which the work is ordinarily done at the port. Evidence may be given of a general regulation or practice there. The words "in regular turn" in a charter-party *prima facie* means the regular turn of the port of loading. But it may be shown, either from the construction of the charter-party itself, or by evidence, that the words were intended to have a different meaning.[b]

A charter-party, dated February 6, 1900, of a sailing ship should proceed to the port of Newcastle, New

[a] 1901, 6 Com. Cas. 217
[b] *Barque Quilpué, Ltd.*, v. *Brown* (1904), 2 K.B. 264.

South Wales, and there "in the usual and customary manner load in regular turn from Brown's Duckenfield Colliery, or any of the collieries the freighters may name," a cargo of coal, which the freighters bound themselves to ship. The charterers were themselves the owners of the Duckenfield Colliery. The ship arrived at Newcastle on August 3rd, 1900, and was not berthed for loading until October 6th. Her loading was completed on October 9th. By the regulations and custom of the port a loading berth could not be obtained until a loading order from the colliery was lodged. On the arrival of the vessel a large number of other vessels, which were entitled to priority over her, were waiting to load coals from the Duckenfield Colliery, and the charterers were unable to give her a loading order until October 5th, when it was lodged and application made to the berthing master for a berth. On the evidence the Court held that the charterers had not chartered more vessels to load their coal than in the ordinary course of their business. The purchasers of the coal refused to accept any other kind of coal, though the charterers endeavoured to induce them to do so. The Court of Appeal held, upon the construction of the charter-party and with reference to the rules and custom of the port, that the words "regular turn" must be taken to mean the regular turn of the colliery. It was held, also, that the shipowners must be taken to have known that the loading of the ship at this port would be probably long delayed, that the charterers had not caused any unreasonable delay, and that they were not liable for the detention of the ship.[c]

In Regular Port Turn.

Lord Justice Vaughan Williams said:[d] "It was contended for the appellants that 'regular turn' means 'in the order of the arrival of the ships' one after the other. I do not think that is the meaning of the words here. Cases have been cited, which, I take it, show that *prima facie* the words 'in regular turn,' unless there is something to a different conclusion, mean 'in regular port turn'; but none of these cases show that 'in regular turn' cannot mean 'in regular

[c] (1904), 2 K.B. 264. [d] (1904), 2 K.B. 270.

colliery turn,' as distinguished from 'regular port turn.' Not only does that seem to me to be the grammatical meaning of the words, but when you look at the condition of the collieries referred to in this charter-party and to the regulations of this particular port, which were perfectly well known to both the parties, the plaintiffs and the defendants, it is hardly possible to avoid the conclusion that both parties must have contemplated that the ship would be loaded in accordance with the 'colliery turn.'"

In Regular Colliery Turn.

If the ship loses her turn because she is not ready when it comes, the charterer is not liable, whether the cause of her not being ready is one for which the owner is to blame or not,[e] unless it is a matter in respect of which the charterer is in default.

Ship not ready when turn comes.

In *Jones* v. *Adamson*[f] the defendant chartered the plaintiff's ship upon the terms that she should go to a foreign port for a cargo, and "there, in the usual and accustomed manner, load in her regular turn." The ship went to the port, but owing to the defendant's default was not ready when her turn came, and was consequently detained eleven days. When her turn came round again she was ready, but the wind coming on to blow, and the harbour being crowded, the harbour-master refused to allow the ship to go up to load, and she was consequently delayed three days. The plaintiff having sued on the charter-party claiming damages for the detention, it was held that the detention for the three days was the legal and natural consequence of the defendant's default in not having the ship ready for the first turn, and that the plaintiff was entitled to damages in respect of the three days as well as the eleven days.

In *Leidemann* v. *Schultz*[g] the defendant chartered the plaintiff's vessel to proceed to Newcastle-upon-Tyne, and there be ready forthwith "in regular turns of loading" to take on board by spout or keel, as directed, a complete cargo of four keels of coal, and the remainder coke. In an action for not loading the vessel with coke within a reasonable time, it was held that evidence was admissible to explain the meaning of

[e] *Taylor* v. *Clay*, 16 L.J. Q.B. 44. [f] 1876, 1 Ex. D. 60.
[g] 1853, 23 L.J. C.P. 17.

the expression in the charter-party, "in regular turns of loading," by showing that there was a usage of the port of Newcastle that vessels should take in their cargoes of coke in a certain regular order or turn; and that the question whether the vessel was loaded within a reasonable time ought not to be decided without reference to such usage, if proved.

In turn to deliver.

A ship being chartered to take coals to Algiers, it was stipulated in the charter-party that the ship should be unloaded, weather permitting, at a certain rate per diem, to reckon from the time of the vessel being ready to unload, and "in turn to deliver." In an action by the owner against the charterers for an alleged detention, the defendants proved at the trial that the coals in question were for the use of the French Marine, who made special regulations with all their contractors with respect to "the turn to deliver," that according to these regulations the delivery was "in turn," and that these regulations formed part of the general regulations of the port. It was held, that the defendants had a right to prove that the contract was entered into with reference to a known recognised use of the words "in turn to deliver" among persons conversant in the trade; and that a question put by the defendants, whether there was any general understood meaning of those words among shipowners and merchants entering into charter-parties with respect to the commerce then under investigation, was unobjectionable.[h]

In *King* v. *Hinde*[i] the plaintiffs' sailing vessel was chartered by the defendant to proceed to Whitehaven for a cargo of coals. The charter-party provided that "regular turn" should be allowed for loading. By the custom of the port of Whitehaven steam vessels, though they arrive in port after sailing vessels, are loaded with coals before the sailing vessels; but as between sailing vessels themselves, sailing vessels are loaded in the order of their arrival in port. The plaintiffs' vessel, though she arrived before several steam vessels, was delayed until they were first loaded; but

[h] *Robertson* v. *Jackson*, 1845, 15 L.J.C.P. 28. See also *Milvain* v. *Peres*, 3 E. & E. 495.

[i] 1883, 12 L.R. Ir. 113.

she was loaded in the order of her arrival as regarded the other sailing vessels in harbour. The plaintiffs claimed demurrage. It was held that the expression "regular turn" in the charter-party should, in the absence of exclusive words, be construed as "regular turn" according to the usage of the port of Whitehaven; that it was not material that the plaintiffs were ignorant of such usage; and that, accordingly, the plaintiffs could not recover.

But in *Hudson* v. *Clementson*,[1] where a "cargo of coke" was to be loaded at Sunderland "in regular turn," it was held that evidence could not be given that by the custom of Sunderland, under such a charter-party, the shipowner was bound to wait until a manufacturer of coke, not named in the charter, had supplied all ships entered in his turn book, provided the manufacturer's name were given at the time of contracting, and provided he used reasonable dispatch.

By a charter-party, it was agreed between the plaintiff, owner of the ship *Sultan*, and the defendant that the ship should proceed to a certain dock, and there load in the customary manner a cargo of Marley Hill coke, "to be loaded in regular turn." The Marley Hill Company kept a book in which they entered ships to be loaded, and it was their practice to enter ships not only before they were ready to load, but before their arrival at the dock, or even at the port, and if a ship was not ready to load when her turn came the ship next in turn was loaded, and the other took its turn, when ready, before others which had been ready before it. On the 26th November the plaintiff's ship arrived at the dock and on the 8th December his agent told the manager that he was ready to load, but several ships which had not arrived and were not ready until after the plaintiff's ship, were loaded before it, in consequence of the order in which they were entered in the book, and the loading of the plaintiff's ship did not commence until the 23rd January. The Judge left it to the jury to say what was the meaning of "regular turn," and they found that the plaintiff's ship was loaded according to the practice of the Marley Hill Colliery, but that it was not an

[1] 1856, 25 L.J.C.P. 234.

established or known custom, and that "regular turn" was the order of readiness, not the order of entry in the book. It was held that the defendant was liable for demurrage.[k]

In *Stephens* v. *Macleod*[l] a charter-party stipulated that the steamship *Cassia* should proceed to "Portugalete, or any other usual ore-loading place in the River Nervion . . . as ordered," and there load a cargo of iron ore, "after being berthed in turn." The vessel was ordered to go to Portugalete. On arrival there, she was entered on a turn list, according to the rule of the port, in the order of arrival on that day. But there were several loading wharves in the port, connected by rail with various deposits of iron ore; and as the wharf to which she was ordered by the charterers was occupied by other vessels the *Cassia* did not get her berth till after other vessels which had arrived at Portugalete after her had been berthed at other wharves. The Court of Session (Lord Young dissenting) held that the ship was not "berthed in turn"; for that meant in turn with vessels as they arrived at Portugalete for iron ore. It was not a stipulation that she should be berthed in turn at any particular berth or for ore from any particular deposit.[m]

[k] *Lawson* v. *Burness*, 1862, 1 H. & C. 396.
[l] 1891, 19 Sess. Cas. (4 ser.) 38.
[m] See *Evans* v. *Blair*, 1902, 114 Fed. Rep. 616.

CHAPTER II.

LOADING AND DISCHARGING.

Where no Fixed Time for Loading or Discharging.

Where no time fixed.

Where the time for loading or discharging is not fixed beforehand, either definitely or by reference to any ordinary practice or dispatch, the contract implied by law is that the merchant and shipowner shall "each use reasonable dispatch in performing his part."[a] Where the charterer of a ship for a voyage to Tobago and back covenanted to load and dispatch her in time to join the convoy that should be appointed to sail from the West Indies on the 1st August, it was held that he was liable for not having loaded and dispatched her by the 22nd July, the day the West India convoy passed the island of Tobago, although he offered to load her with a complete cargo if she would stop a few days longer. Lord Ellenborough said:—"I think the captain was at liberty to sail from Tobago on the 22nd, the day when the convoy passed the island. The covenant must receive a reasonable construction. Had the ship not arrived in time to be loaded by the 22nd the case would have been different; but as she was ready to take in goods for the homeward voyage on the 14th July, the charterers were bound to have supplied her with a full cargo, before the time when the general West India convoy passed by the station where she lay. Even if the captain might have been able

[a] *Ford* v. *Cotesworth*, 1868, L.R. 4 Q.B. 137.

afterwards to have overtaken it, he was not bound to wait for the convenience of parties, as he must thereby have increased the risk of capture."[o]

To Discharge within a reasonable time.

Where a bill of lading is silent as to the time within which the consignee is to discharge the ship's cargo his obligation is to discharge within a reasonable time. And that obligation is performed if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming that those circumstances, in so far as they involve delay, are not caused or contributed to by him. A cargo was shipped in the port of London under bills of lading which did not specify the time within which the consignees were to take discharge of it. Upon the arrival of the ship in the dock, the dock company as agents for the consignees began to unload the cargo. The unloading was interrupted for several days by a strike of the dock labourers, which delayed the discharge far beyond the time which would otherwise have sufficed. Throughout the time during which the discharge ceased, and the dock company were unable to supply labour to effect it, it was not possible for the consignees either to find any other person to provide the labour or themselves to obtain the necessary labour in any other way. The House of Lords held that the consignees were not liable in damages to the shipowner for the delay.

Meaning of the expression "Reasonable Time."

Lord Herschell L.C. said[p]:—"There is, of course, no such thing as a reasonable time in the abstract. It must always depend upon circumstances. . . . But what may, without impropriety, be termed the ordinary circumstances differ in particular ports at different times of the year. As regards the practicability of discharging a vessel they may differ in summer and winter. Again, weather increasing the difficulty of, though not preventing, the discharge of a vessel may continue for so long a period that it may justly be termed extraordinary. Could it be contended that in so far as it lasted beyond the ordinary period the delay caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time?

[o] *Thompson* v. *Inglis*, 1813, 3 Camp. 428; see *Connor* v. *Smythe* 5 Taunt. 654.

[p] *Hick* v. *Raymond*, 1893, A.C. p. 29.

It appears to me that the appellant's contention would involve constant difficulty and dispute, and that the only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable dispatch under those circumstances, I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee."[q]

Delay must not have been caused by Consignee.

It was held in *Beard* v. *Rhodes*[r] that the words "at the expiration of" in a charter-party were synonymous with the words "a reasonable time after."

In *Tillett and Co.* v. *Cwm Avon Works Proprietors*[s] the plaintiffs, shipowners, sued defendants, consignees, for damages for delay in unloading. In the bills of lading there was no stipulation as to the time for unloading, and the plaintiffs' vessel could only be discharged at one of three berths, the property of the consignees, which, at the time of the arrival of the plaintiffs' ship at the port, had all been occupied by other vessels with cargoes belonging to the defendants. The discharge of the plaintiffs' ship was thereby delayed for several days. It was held that it having been an implied term in the contract that the defendants should discharge the cargo within a reasonable time, the plaintiffs, under the circumstances, could recover damages for the loss occasioned by the delay.[t]

Reasonable time implied.

In *Wright* v. *New Zealand Shipping Co.*[u] Lord Justice Cotton[v] said:—"In a contract of this nature a difficulty arises as to the meaning of the expression 'reasonable time,' and I think that the difficulty arises from not considering what the obligations of the parties are, and from not considering what facts are to be taken into account as between the parties to the contract in ascertaining what is a reasonable time. Therefore I propose to state what is the obligation of the charterers under these circumstances, and what they

Difficulty as to the meaning of "Reasonable Time."

[q] *Carlton S.S. Co.* v. *Castle, &c., Co.* (1898), A.C. 86; *Hicks* v. *Tweedy*, 63 L.T. 765; *Zillah* v. *Midland Ry. Co.*, 19 T. L.R. 67.
[r] 1873, 28 L.T. 168. [s] 1886, 2 T. L.R. 675.
[t] See *Hill* v. *Idle*, 1815, 4 Camp. 327.
[u] 1879, 4 Ex. D. 165. [v] 4 Ex. D. 169.

are entitled, and what they are not entitled, to take into account in fixing what is a reasonable time. I shall not attempt to lay down an exhaustive rule, but shall speak chiefly with reference to the case before us. In determining whether a duty such as is created by this charter-party has been performed within a reasonable time, we must take it that an obligation is imposed on the charterer of providing at the port of discharge sufficient appliances of the kind ordinarily used at the port, and that he must have them ready either when the ship arrives or within a short time, such as a day or a couple of days, after her arrival; perhaps where a ship arrives unexpectedly, much sooner than could have been anticipated, a delay may be allowed, and a different rule may be applicable from that governing a case where the ship arrives at the appointed time. I say 'appliances of the kind ordinarily used at the port,' for which the ship is destined, because the charterer ought not to be called upon to provide appliances which are not in use there, but which are in use at other ports; he is not bound to provide at a port in New Zealand appliances which are not in use there, but are in use in the port of London; for they cannot be deemed to have been in the contemplation of the parties. Although the charterer may not be bound to work during the whole of the twenty-four hours, yet he must work during the ordinary time of working at the port where the ship is to unload. I will proceed to consider what circumstances will entitle the charterer to allowances for delay. I apprehend that he will be entitled to an allowance if any difficulty arises from the nature or physical peculiarities of the port, such as that the ship is obliged to lie at some considerable distance from the land, or that while the wind is blowing from certain points of the compass ships cannot be unloaded with lighters, he may be entitled to an allowance also if after the ship has been partly unloaded in deep water she is brought into shallower water for the more convenient discharge of her cargo: whether the unloading can go on during the change of berth is a question of fact upon which the jury must give their opinion. I think also that allowance must be made for

Charterer must supply sufficient appliances of the kind ordinarily used.

any holidays usually observed at the port, and during which no work is done. . . . For the purpose of ascertaining what is a reasonable time the defendants are not entitled to excuse delay, which would be otherwise inexcusable, by alleging that they had sent so many vessels to the port that the number of lighters which they had engaged did not enable them to unload the plaintiff's ship within what would otherwise have been a reasonable time. It was the duty of the defendants to provide sufficient appliances for unloading the plaintiff's ship. In like manner the defendants cannot excuse the delay by alleging that there was at the port so many other vessels consigned or belonging to other persons as to prevent them from using the appliances, which otherwise might have been used for the purpose of unloading the ship."[w]

Allowance to be made for Holidays usually observed at Port.

No excuse to allege that other vessels prevent loading.

The House of Lords has held[x] that when the contract is silent, the obligation of the merchant is to use "all reasonable diligence under the circumstances which exist at the time of unloading."[y]

In the case of *Empire Transport Co.* v. *Philadelphia Co.*,[z] the Judges of the American Courts reviewed both the English and American decisions on the question of "reasonable time." The Circuit Court of Appeals held that under ordinary circumstances, the customary time for unloading a vessel at her port of delivery is a reasonable time for that work; but the implied contract is to discharge her in such time as is reasonable under all the existing circumstances, ordinary and extraordinary, which legitimately bear upon that question at the time of her discharge, and it is not to discharge her in the customary time, regardless of unforeseen obstacles and unusual circumstances. The burden is on him who seeks to recover damages for the delay of a vessel, under such a contract, to prove that the charterer did not exercise reasonable diligence to discharge her under the actual

Burden of excusing delay thrown upon Charterer.

Opinion of American Judges.

[w] See also per Fry L.J. in *Hick* v. *Rodocanachi* (1891), 2 Q.B. 645; *Ford* v. *Cotesworth*, L.R. 4 Q.B. p. 137; Cf. *Taylor* v. *G. N. Ry. Co.*, L.R. 1 C.P. 385; and per Brett L.J. in *Nelson* v. *Dahl*, 12 ChD. 568, pp. 583, 584. But see *Hill* v. *Idle*, 4 Camp. 327.

[x] *Hick* v. *Rodocanachi* (1891), 2 Q.B. 326; affirmed in the House of Lords as *Hick* v. *Raymond* (1893), A.C. 22.

[y] See also *Carlton S.S. Co.* v. *Castle, &c., Co.* (1898), A.C. 486; *Lyle Sk. Co.* v. *Cardiff* (1900), 2 Q.B. 638.

[z] 1896, 77 Fed. Rep. 919.

circumstances of the particular case. Proof that the vessel was delayed in unloading beyond the customary time for discharging such cargoes at the port of her delivery throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the delivery and his diligence thereunder. A strike of the employés of the charterer, without grievance or warning, and an organised and successful effort on their part to prevent by threats, intimidation and violence other labourers who were willing to do so from discharging a vessel, was held to excuse the charterer for delay of a week in the performance of that work.

In *Hick* v. *Rodocanachi*[a] the plaintiff, a shipowner, brought an action against the consignees of the cargo for delay in unloading the ship. It appeared that the defendants were consignees under a bill of lading which imposed no express limit of time within which the goods were to be unloaded, but contained a stipulation that the goods were to be applied for within twenty-four hours after the ship's arrival, otherwise the master of the ship might himself unload at the expense of the consignees, and should have a lien on the goods for all freight and expenses. The ship arrived at the port of discharge, and the defendants duly applied for the goods and commenced to unload them; but a strike of the dock labourers occurred, and the unloading was delayed for about a month, and was then completed by the defendants. Both plaintiff and defendants did all they could under the circumstances to expedite the unloading of the ship. The Court of Appeal held, and this was afterwards affirmed by the House of Lords, that the bill of lading containing no stipulations as to the time within which the cargo was to be discharged, the defendants were entitled to a reasonable time, and that in the absence of any special provision on the subject, the reasonableness of the time for unloading must be considered with reference to the circumstances which existed at the time of unloading; and that as the strike could not be attributed to any default on the part of the defendants they were not liable for the delay. Lindley L.J. said[b]:—"We have to deal with implied

[a] 1891, 2 Q.B. 626. [b] 1891, 2 Q.B. p. 638.

obligations, and I am not aware of any case in which an obligation to pay damages is ever cast by implication upon a person for not doing that which is rendered impossible by causes beyond his control. Where no time for unloading is fixed by contract the merchant's obligation is, in my opinion, to use all reasonable diligence under the circumstances which exist at the time of unloading, unless, indeed, as in *Hill* v. *Idle*[c] and in some other cases like it, those circumstances are attributable to his own conduct. Unless he has caused the delay or unless it has been caused by his agents or servants, he is in no default, and the loss to the shipowner must be borne by him, not because he is in fault, but because he is unable to show any default on the part of the cargo-owner rendering him liable for the delay from which the shipowner has suffered. . . . The conclusion at which I have arrived is in harmony with the ordinary course of business; for there are two well-known forms of contract, one with and the other without a specified number of days for unloading. If the first form is used, the risk of a strike falls on the merchant; if the second form is used it does not, and the risk falls on the shipowner, not because he has agreed to bear it, but because he is unable to throw it on the merchant."

A charter-party which provides that the cargo is "to be discharged as customary for steamers at port of discharge" is in effect an open charter-party, under which it is the right of the ship and the duty of the consignee to have the cargo discharged with reasonable dispatch. The giving of reasonable dispatch is a requirement which the consignee is bound to satisfy, *de die in diem*. He cannot, by working extra hard on one day, entitle himself to idle on another day; and if he has done more than an average quantity at the beginning of the discharge he cannot on that account relax the measure of reasonable diligence towards the end.[d]

Lord Selborne said, in *Postlethwaite* v. *Freeland*[e]:— "Difficult questions may sometimes arise as to the

[c] 4 Camp. 327.
[d] *Aberdeen Glen Line SS. Co.* v. *S.S. Gairlock* (1899), 2 T.R. 1.
[e] 1880, 5 A.C. 599, 608.

Reasonableness of the time must be judged with reference to facilities available

circumstances which ought to be taken into consideration in determining what time is reasonable." But his Lordship approved the direction of Lord Chief Justice Cockburn to the jury in *Ford* v. *Cotesworth* that "The question whether the time was reasonable or unreasonable ought to be judged with reference to the means and facilities available at the port, and to the regulations and course of business at the port."

In *Ford* v. *Cotesworth*[1] the defendants chartered the plaintiff's ship for a voyage to Lima. The cargo was to be delivered "in the usual and customary manner," but no express time was provided in which such delivery was to be made. The ship reached Callao, the port of Lima, and began discharging, when, owing to hostilities between Spain and Peru, the authorities refused to allow any more cargo to be landed, with the result that the ship could not deliver, nor the merchant receive. The Courts of Queen's Bench and Exchequer Chamber held the merchant not liable, in an action for demurrage for this delay. Blackburn J., delivering this judgment of the Court, said[2]:—"Where the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, there is no principle on which, in the absence of a stipulation to that effect, either expressed by the parties or to be collected from what they have expressed, the damages arising from an unforeseen impediment are to be cast by law on the one party more than on the other; and consequently we think that what is implied by law in such case is, not that either party contracts that it shall be done within either a fixed or reasonable time, but that each contracts that he shall use reasonable diligence in performing his part. It is on the application of this principle to a charter-party that the present question depends. We think that delivering cargo is as much the duty of the shipowner as of the merchant; and consequently that the contract, implied by the law in the absence of any stipulation, in a charter-party is that each party shall use reasonable diligence in performing his part of the delivery at the port of dis-

[1] 1870, L.R. 4 Q.B. 127; L.R. 5 Q.B. 544.
[2] L.R. 4 Q.B. p. 133.

charge; the merchant being ready to receive in the usual manner, and the owner by his captain and crew to deliver in the usual manner. So that there is no contract implied by law on the part of the shipowner to allow his vessel to be kept there for the usual time, if by reasonable diligence on the part of the merchant the cargo might be sooner taken away; and no contract implied by law on the part of the merchant to take the cargo out within such usual time if he could not by reasonable diligence perform it; though very commonly there are stipulations to that effect."

This judgment was affirmed in the Exchequer Chamber[h] and Kelly C.B. there said:—"I was from the first prepared to agree with the Court of Queen's Bench in treating the delivery of the cargo at the port of destination as one entire act, in which both parties have to perform their parts; the defendants have to provide lighters, and the plaintiffs to assist in putting the goods over the side of the ship; and the plaintiffs were as much prevented from doing their part as the defendants. For had the defendants provided lighters, as it was contended they ought to have done, notwithstanding the order not to land any more goods, no doubt the authorities would have prevented the goods from being put on board the lighters; and it is absurd to suppose that the goods could have been put into seventy or eighty lighters and left floating in the harbour.

The above case was followed in *Cunningham* v. *Dunn*.[i] In that case it was agreed by a charter-party that the defendant's ship, the R., should, after loading "deadweight" at M., proceed to V., a Spanish port, and there load a cargo of fruit for the plaintiff. At the time of entering into the charter-party the plaintiff knew that the "deadweight" intended to be put on board the R. at M. would consist of military stores, and he knew that by the ordinary law of Spain a vessel with warlike stores on board would not be allowed to load at a Spanish port. Upon application being made to the Spanish Government to relax the prohibition permission to load was refused. The R. arrived at V.

[h] L.R. 5 Q.B. 544. [i] 1878, 3 C.P.D. 443.

with the warlike stores on board, but otherwise ready and fit to load the agreed cargo: she left immediately on learning that permission to load would not be granted. The Court of Appeal held that the plaintiff could not sue the defendants for not having the R. ready to load, for, through the act of a superior power, the parties were unable to perform their respective duties under the contract, the plaintiff being unable to load the cargo, and the defendants to receive it.

Performance of Contract impossible owing to superior power.

Bramwell L.J. said that the shipowner had "committed no default at Valencia. I think that this case is governed by the principles laid down in *Ford* v. *Cotesworth;* the plaintiff as charterer was willing to put a cargo on board, but a power over which neither party had any control prevented the defendants, as shipowners, from receiving it. . . . My judgment is for the defendants, and the grounds of it are, first, that there was at Valencia a joint inability to perform the charter-party, and not a refusal by the defendants so to do; secondly, that there was no warranty that the deadweight should be such as to allow the vessel to be loaded; thirdly, that if the defendants were bound not to disable themselves from taking on board the plaintiff's cargo, they did not know at the time of entering into the charter-party that they would so disable themselves; and, fourthly, that the plaintiff gave the defendants licence to sail to Valencia with the military stores on board."

Where no Contract as to Demurrage. Detention for unreasonable time.

If there be no contract as to demurrage a shipowner cannot, on a common court for demurrage, recover for the detaining of the ship for an unreasonable time in loading and unloading, but must declare specially.[1]

Time Fixed for Loading and Discharging.

It is usual in charter-parties, and sometimes in bills of lading, to fix times within which the ship is to be loaded and discharged, and where that is done, the provision is understood as an undertaking by the freighter that the ship shall be loaded or discharged within the time so fixed. The shipowner must not be in default; he must by his servants do his part of the

[1] *Horn* v. *Benusan*, 1841, 9 Car. and P. 709.

work of receiving and stowing, or unloading, with diligence and with the proper number of men; but the undertaking as to the time which the loading or discharge shall occupy is given by the freighter, not by the shipowner. This is commonly marked in the charter-party by saying that so many days "are to be allowed the said merchant for loading, etc." But the effect is the same, whether the clause is in that form, or states generally that the cargo "shall be loaded" in so many days. The promise is made by the freighter for the benefit of the shipowner.[k] Exceptional cases, however, occur. In *Dobell and Co.* v. *Watts*,[l] which was a case arising out of the great strike at the London docks in August, 1889, a charter-party contained the following clause:—"The cargo to be received from alongside the ship at the port of discharge, as customary, as fast as ship can deliver in ordinary working hours, Sundays excepted, not less than 100 standards per day, loading or discharging. The vessel to be ten days on demurrage over and above the laying days at £70 per day." The Court of Appeal held that the words "not less than 100 standards a day" were a provision in favour of the cargo-owner, and not intended to fix any number of lay days. Its effect was to make it obligatory on the ship to deliver not less than 100 standards a day, the interests of the shipowner as to rate of loading and discharge being amply protected by the other terms of the clause. The duty of providing, and making proper use of, sufficient means for the discharge of a cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charter-party, and by the circumstances of the case. If, by the terms of the charter-party, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part,

Not less than 100 standards a day

[k] Carver on Carriage by Sea, p. 723.
[l] 7 T. L.R. 426, 622.

to discharge the cargo within a reasonable time.[m] "When the contract merely engages that the merchant shall with all dispatch, according to the custom of the port, unload the vessel, he will fulfil his contract if he employs all the usual methods of dispatch at the port."[n]

Time fixed for Loading and Discharging.

In all commercial and maritime affairs, time is an element of great value and importance. It should follow, therefore, that both parties should be punctual. If the ship is not ready when she should be, but a material delay seems to be probable, the charterer may seek another ship; if the cargo be not ready, the owner may seek another cargo.[o] Thus in *Weisser* v. *Maitland*[p] the charter-party provided that the charterer should be allowed for the loading and discharging of the vessel as follows: "Lay days, to load, twenty days from the twelfth." The owner guaranteed to have the vessel ready by that time. The charter-party was to commence when this vessel was ready to receive her cargo, and notice thereof given to the charterer. It was held that the vessel's being ready on the day named was a condition precedent to the charterer's liability to put on board the cargo. The Court said:— "Time was of the essence of the contract, and it is often so in commercial transactions. The success of the enterprise often depends upon dispatch. The cases show that the great principle to be considered is the intent of the parties, and where the time is essential, and the words of the charter-party are plain, as is the case here, we cannot doubt that the agreement in reference to the day when the vessel was to be ready is to be regarded as a condition precedent."

When Charterer may seek another Ship owing to delay.

In *Seeger* v. *Duthie*,[q] it was agreed by a charter-party between the plaintiff, as captain of the vessel, and the defendants, as charterers, that the vessel should take on board all such lawful goods as might be required by the defendants, and being so loaded, should proceed to Geelong, in Australia; that the captain should attend daily at the broker's offices to sign bills of lading. This charter-party contained the following clause:—"In consideration whereof the

[m] *Postlethwaite* v. *Freeland*, 5 A.C. 599, House of Lords.
[n] Per Lord Hatherley, 5 A.C. 612. See *Hick* v. *Raymond*, 1893, A.C. 22.
[o] Parsons on Shipping, Vol. I., p. 310 (1869).
[p] 3 Sandf. 318. [q] 1860, 30 L.J. C.P. 65.

charterers agree to pay freight for the use and hire of the ship £1,400, with a gratuity of 25 guineas, to the master, payable before leaving London." Then followed this clause:—"The owner agrees that the ship shall be ready to sail at the expiration of the laying days, or sooner if required by the charterers. If the ship is not ready, either on the owner's or the charterer's part, at the above-named dates, then demurrage to be paid by the party in default, at the rate of £7 per diem, the ship to be ready on or before the 10th November, or the charterers to have the option of cancelling this agreement." The freight was stipulated to be paid, partly by bills of lading, at the port of destination, to the extent of £800 and balance of £600 in cash, less seventy days' discount from the day of clearing from London. It was held that the stipulations on the part of the owner were not conditions precedent to his right to sue for the £600 as soon as the ship should have cleared from London.

A charter-party contained the following clause:—"The owner agrees that the ship shall be ready to sail at the expiration of the laying days, or sooner if required by the charterers. If the ship is not ready either on the owner's or the charterer's part at the above-mentioned dates, then demurrage to be paid by the party in default at the rate of £7 per diem." It was held that the effect of this stipulation was to make the owner liable for demurrage at £7 a day, for delay caused by any unreadiness of the ship to sail due to him; and the charterers were liable in like manner for delay caused by unreadiness of the ship due to their backwardness as to the cargo, though that might have been occasioned by the previous default of the owner. Demurrage clause was held not applicable in case of delay caused by the master refusing to take on board goods which he erroneously thought she was not bound to take.[q]

In *Granger* v. *Dent*[r] a charter-party contained a proviso that if the ship did not arrive at her port of loading on or before, etc., unless prevented by stress of weather or other unavoidable impediment, the

[r] M. and M. 475.

Delayed by stress of weather.

freighter should not be obliged to ship a cargo. It was held that if ordinary diligence were used in the voyage to reach the port of loading, the owners were within the exception of the proviso, though the ship was delayed till after the stipulated time by causes which extraordinary exertion might have counteracted.

Where a ship was freighted to go in ballast to Jamaica, and bring home a cargo, and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived out and was ready by the 25th June, it was held when she did not arrive out till after the 25th June, that the freighter was entirely discharged from his contract to furnish a cargo.[s] The master of a ship, under a charter-party to load a cargo at a foreign port, and thence proceed to a port in Great Britain as ordered, is not bound, in default of orders, to wait at the foreign port until he has communicated with the charterer.[t] The shipowner must perform the voyage in as short a time as is consistent with safety, and for any loss sustained by the charterer in consequence of the voyage being protracted by any culpable act of commission or omission, the owner is liable.[u] The charterer must load and unload with all reasonable dispatch; and the owner must give him all reasonable facilities; and for non-performance of these obligations, on either side, the injured party may have his remedy, without any express stipulations.[v]

Shipowner must perform voyage as quickly as possible.

If there be an express contract in relation to these obligations, the parties are held strictly to its terms, and, generally speaking, no excuse is available for delay, though without the fault of the party, which is not given by the contract itself. But in the absence of an express agreement there is an implied contract that the owner and consignee of the goods will provide for discharging them in a resonable time; and it has been held that this time is for the jury to ascertain upon a consideration of all the circumstances. It was held, accordingly, that the consignee of goods, to be dis-

[s] *Shadforth* v. *Higgin*, 3 Camp. 385.
[t] *Sieveking* v. *Maas*, 25 L.J. Q.B. 358.
[u] *The Bark Gentleman*, 1 Blatchf. C.C. 196.
[v] See *Sweeting* v. *Darthez*, 14 C.B. 538.

charged at his own wharf on Lake Ontario, was entitled to explain his delay in giving a berth to the ship, by proof that a break on the Erie Canal, and a storm on the lake, had caused an unusual number of vessels to be collected at his wharf just before the arrival of his goods.[w]

By a charter-party the cargo was "to be received from alongside free of expense and risk to the ship according to the customs and laws at the port of destination, with customary dispatch, within thirty-five weather working days after receipt by consignees of captain's written notice that he is ready to discharge. . . . Demurrage in unloading, if any, to be paid by consignees at 3d. per net registered ton per running day, except in cases of unavoidable accidents to or hindrances beyond the consignee's control." The words "within thirty-five working days" were written in ink, the rest of the clause being in print. At the port of discharge the ship was prevented from unloading within thirty-five days by hindrances beyond their control, and was detained fifty-two days beyond. Upon a claim for fifty-two days' demurrage it was held by Kennedy J. that the consignees were not liable.[x]

Hindrances beyond the control of Consignees.

Under stipulations allowing a specified time, the charterer's obligation is absolute so as to render him responsible for non-fulfilment, unless the cause of it be one covered by an exemption contained in the charter-party, or unless it be due to the fault of the shipowner, or of those for whom he is answerable. In *Hansen* v. *Donaldson*[y] the discharge of the cargo of a vessel occupied several days beyond the lay days stipulated in the charter-party. The crew worked with reasonable diligence, but it was impossible for them without assistance to discharge the cargo within the stipulated time. In an action for demurrage at the instance of the master, the Court of Session held (1) That the consignee was liable for two days' delay caused by the vessel being unable to find a berth at the quay; but (2) that the consignee was not liable for subsequent delay, because there was an implied obli-

Effects of a fixed time.

[w] *Cross* v. *Beard*, 26 N.Y. 85.
[x] *Aktieselskabet "Argentina"* v. *Von Laer*, 1903, 19 T.L.R. 151.
[y] 1874, 1 Sess. Cas. 4 ser. 1066.

gation on the master to give delivery within the time, and as he had failed to do so he could not claim demurrage.

Quarantine.

The loss to a ship through an unexpected detention by quarantine on arriving at the port of loading falls upon the shipowner, even when the charter-party binds the charterer to load within a fixed period after the ship's arrival in respect that the ship cannot be regarded as having arrived at the port of loading until it is placed by the shipowner at the disposal of the charterer.[z]

Want of Wagons.

By a charter-party it was agreed that a vessel should, after loading, proceed to Leith docks "and deliver" the cargo of coal "alongside any safe wharves, crafts or depôts." The cargo was to be taken alongside the vessel "at the merchant's risk and expense, according to the usual custom at loading and discharging ports." Forty-eight running hours were allowed for discharge, after which demurrage was stipulated for, "except in case of strikes . . . detention by railway or cranes . . . or any other cause beyond the control of the charterers which may impede the ordinary lading and discharging of the vessel." On the arrival of the vessel at Leith, in consequence of a strike of railway servants, the charterers could not be supplied with wagons to remove the coal by railway as they had arranged with their customers to do, and did not discharge the vessel within the running hours. There was no rule of this port that coal must be discharged into wagons or forbidding its discharge on the quay. In an action by the owners for demurrage in respect of the charterer's failure to discharge within the running hours, the Court of Session held that the charterers had failed to show that the discharging of the vessel had been impeded by any of the excepted causes.[a]

Causes of delay.

When the time is definitely fixed, or is described so as to be calculable beforehand, there is an absolute obligation on the charterer to have the work completed within that period, whatever circumstances occur. He

[z] *White* v. *Steamship Winchester Co.*, 1886, 13 Ct. of Sess. Cas. 595.

[a] *Granite City S.S. Co.* v. *Ireland*, 1891, 19 Sess. Cas. 4 ser. 124.

is answerable, although the completion may have become impossible owing to causes which have arisen without any fault or omission on his part. Thus he bears the risk of delay arising from the crowded state of the place at which the ship is to load or discharge[b]; or from frost,[c] or bad weather[d] preventing access to the vessel; or from acts of enemies,[e] or of the Government of the place prohibiting export, or preventing communication with the ship.[f] And it is immaterial that the shipowner also is prevented from doing his part of the work within the agreed time; unless he is in fault. The charterer takes the risk. His contract is "that, if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge," he will pay for the delay, "however the delay may be caused, unless it is by default of the shipowner."[g]

Loading and discharging to be considered separately.

The time occupied in loading a vessel is not, in the absence of stipulation, to be lumped with the time occupied in discharging her to the effect of working off by extra dispatch in the one operation demurrage incurred by delay in the other. A charter-party provided:—"Cargo to be loaded and discharged as fast as steamer can receive and deliver during usual working hours. If longer detained, demurrage to be paid at the rate of £12 per day." At the port of loading the ship was detained a day and a half beyond the time in which she could have been loaded. The ship's agent, in advising the dispatch of the vessel, wrote to the shippers: "If you give us really good dispatch and moderate charges at Peterhead, I will try and get my folks to meet you in this matter." On the arrival of the ship at the port of discharge extra time was worked, with the result that the vessel was discharged a day sooner that she would have been under ordinary conditions. In an action raised for the demurrage for a day and a-half, the shippers claimed that they were entitled, lumping the periods of loading and discharge, to escape on payment of a half-day's demurrage. The

[b] *Randall* v. *Lynch*, 2 Camp. 352.
[c] *Barrett* v. *Dutton*, 4 Camp. 333. [d] *Thin* v. *Byers*, 1 Q.B.D. 244.
[e] *Burrill* v. *Crossman*, 69 Fed. R. 747.
[f] *Barker* v. *Hodgson*, 3 M. and S. 267. See also *Sjoerds* v. *Luscombe*, 1812, 16 East 201.
[g] Per Brett L.J., *Porteus* v. *Watney*, 3 Q.B.D. p. 543

Court of Session of Scotland (Lord Young dissenting) held that they had no such right under the charter-party, that the letter of the ship's agent imparted no such right, and therefore that the full amount of demurrage incurred at the port of loading was due.[h]

By a charter-party between the plaintiff and the defendants it was agreed that the plaintiff's ship should proceed to Bilbao and there load a full and complete, or part, cargo of iron ore, and deliver the same at Middlesbrough: "400-500 tons per working day (Sundays and holidays excepted) to be allowed the charterers for loading, and 300 discharging, all demurrage over and above the said days at the rate of 2s. per hour for every 100 tons cargo. The lay days to commence day after arrival, and being ready to load or discharge respectively. The captain to have a lien on the cargo for freight or demurrage." "If the ship is loaded at other than the Portugaletta or Lucana shipping staiths, the loading and discharging to be at the rate of 300 tons per working day." The vessel having loaded at a place other than those last-mentioned at a rate less than 300 tons per working day, proceeded to Middlesbrough, where she discharged her cargo at a higher rate per day. It was held that, in calculating the demurrage, the days for loading and unloading must be kept separate, and that the charterers had no right to add together the whole number of days occupied in loading and unloading for the purpose of ascertaining the average amount of work done on each day.[i]

Upon the following clause in a charter-party: "the vessel to lie her regular time for loading her cargo and one day per keel running days, demurrage £3 per day for every working day's detention, over and above the days allowed as aforesaid," demurrage can be claimed only in respect of loading, and not of the time spent in the delivery of the cargo.[j]

Averaging the days for loading and discharging.

Where, however, a charter-party gives liberty to the charterers "to average the days for loading and discharging in order to avoid demurrage," the charterers may add together at the port of loading the days

[h] *Avon S.S. Co.* v. *Leash & Co.*, 1890, 18 Sess. Cas. (4 ser.) 880.
[i] *Marshall* v. *Bolckow*, 1881, 6 Q.B.D. 231.
[j] *Alcock* v. *Taylor*, 2 H. and W. 58.

allowed for the two operations of loading and discharging, and the ship does not come on demurrage till the days so added together are exhausted.[k]

But in *Oakville S.S. Co.* v. *Holmes*[l] a charter-party provided that a cargo of iron ore should be loaded and discharged at the rate of 200 tons per twenty-four hours—charterers to have the option of averaging days for loading and discharging in order to avoid demurrage. . . . Dispatch-money to be paid for any time saved in loading . . . to be settled in the loading port. The charterers, having saved time at the loading port, agreed with the captain the amount of dispatch-money for such time, and indorsed it on the bill of lading as an advance of freight. At the port of discharge the lay days were exceeded. The charterers claimed to average the days for loading and discharging. It was held that as the charterers had exercised their option by treating dispatch-money as an advance of freight at the loading port they were not entitled to average the days for the purpose of avoiding demurrage at the port of discharge.

Dispatch Money for times saved.

Right to average lost.

In *Laing* v. *Hollway*[m] a charter-party contained the following clause:—"Demurrage, if any, at the rate of 20s. per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Dispatch-money 10s. per hour on any time saved in loading or for discharging." Four days were saved in loading and five days in discharging cargo, making together nine days, which if calculated at twenty-four hours a day would make 216 hours, or at twelve hours a day 108 hours. The Court of Appeal held that "dispatch-money" was payable under the charter-party at the rate of 10s. per hour per day of twenty-four hours.

Dispatch Money per hour.

The plaintiffs' steamer was chartered by the defendants to carry a cargo of coals, "to be discharged at the rate of 200 tons per day, weather permitting (Sundays and fête days excepted), according to the custom of the port of discharge, and if sooner discharged to pay at the rate of 8s. 4d. per hour for every hour

[k] *Molière Steamship Co.* v. *Naylor*, 1897, 2 Com. Cas. 90.
[l] 1899, 5 Com. Cas. 48.
[m] 1878, 3 Q.B.D. 437.

saved." It was held that Sundays and fête days were excluded both in the computation of the time allowed for discharging and in that of the time saved, so that dispatch-money, by way of set-off to a claim for freight, was only payable, by the plaintiffs to the defendants, on the difference between the number of hours actually occupied by the defendants in the discharge and the total number of hours which the charter-party allowed them.[a]

[a] *The Glenderon*, 1893, P. 269.

CHAPTER III.

CAUSES OF DETENTION IN LOADING AND DISCHARGING.

Charter-parties frequently stipulate for a rate of demurrage, to be paid in case the ship is detained beyond the agreed or proper time, without stipulating for any particular number of extra days to be allowed by the shipowner. In such cases the charterers appear to be entitled to keep the ship on demurrage for a reasonable time.[o]

Damages for Detention.

"If a ship is detained beyond her days of demurrage, *prima facie*, the sum allowed as demurrage shall be taken as the measure of compensation. This is a rule both of convenience and of justice. But it is open to the shipowner to show that more damage has been sustained, and to the freighter to show there has been less than would thus be compensated."[p]

In *Jamieson* v. *Laurie*[q] a ship had been sent to Cronstadt to receive a quantity of tallow and other goods, under an arrangement with merchants of a somewhat indefinite character. It appeared, however, that the goods ought to have been shipped before the 1st September, but that, owing to delay in their arrival at the port they were not, in fact, shipped until October, and the ship was consequently not ready to sail until Octo-

[o] See *Lilly* v. *Stevenson*, 1895, 22 Sess. Cas. (4 ser.) 278; *Western Transport Co.* v. *Barley*, 1874, 56 N.Y. 544.

[p] Per Ld. Ellenborough in *Moorsom* v. *Bell*, 1811, 2 Camp. 616. See *Sully* v. *Durant*, 1864, 34 L.J. Ex. 319; *Hick* v. *Rodocanachi* (1891), 2 Q.B. 633; *Cropton* v. *Pickernell* (1847), 16 M. and W. 829; *Herring* v. *Ward*, 1839, 8 L.J. Q.B. 218; *Steel, Young & Co.* v. *Grand Canary Coaling Co.* 9 Com. Cas. 295.

[q] 6 Bro. Parl. C. 474.

ber 28th. She then waited a few days for a wind, and sailed; but, soon meeting with adverse winds and frost, was forced to return to Cronstadt, and was there frozen up, and remained until the 11th of May. The winter began earlier than usual. The shipowner claimed demurrage from the 1st of September to the 11th of May. The case came before the House of Lords on appeal from the Scotch Courts. It was admitted that the master might by law have returned empty, or might have taken another cargo after the 1st of September, but the owner contended that as the master had waited at the request of Jamieson and Co. (the merchants) they were answerable for all the damage arising from the delay. It was decided by the House of Lords that they were liable to pay compensation, in the nature of demurrage, for the period betweeen the 1st of September and the 29th of October, but not in respect of the detention after the ship was ready to sail.

Default of Charterer.

Where the charter-party provides that demurrage shall be payable "for each day of detention by default of the charterers or their agents," the word "default" means an omission or neglect to perform the contract.[r]

In *The Gazelle*[s] it was held that in fixing the amount of demurrage to be paid for detention of a vessel during repairs a deduction must be made from the gross freight of so much as would in ordinary cases be disbursed on account of the ship's expenses in the earning of the freight.

Performance by Charterer not excused on account of dispute with third person.

In *Erichsen* v. *Barkworth*[t] Mr. Justice Compton said:—"It is no excuse for the charterer not performing his contract with the shipowner that there is some dispute between him, the charterer, and a third party respecting the goods. Whether he be right or wrong in it, it is no answer to this action that the charterer refuses to take to the goods. . . . I do not say that the master is to keep the goods on board for an unreasonable time. The contract is that the charterer, if the ship is not unloaded before the days of demurrage, shall pay a certain sum per day, and after those days shall pay a reasonable sum by way of damages, to be estimated by the jury. If the master kept the goods

[r] *Burrill* v. *Crossmann*, 1895, 69 Fed. Rep. 747. [s] 1844, 2 W. Rob. 279.
[t] 1858, P. 28 L.J. Ex. 96.

on board vexatiously, and beyond what was necessary for his own protection, the jury would, of course, assess a very small sum."

Deviation owing to Repairs.

A vessel was chartered, "then on her way to Grangemouth," to load at Grangemouth a cargo of coal in so many days—demurrage so much. After unloading at Grangemouth it was necessary for her to go to Alloa for repairs. When repaired she returned to Grangemouth, but, cargo not being ready, was detained. It was held that the deviation to allow of repairs did not found a defence to a claim for demurrage.[u]

A charter-party provided that, in the event of loss of time from "detention by average accidents to ship," the payment of hire should cease for the time thereby lost. An average accident having occurred to the ship while on a voyage from Hamburg to New York, she put back to Queenstown for repairs. After being repaired the voyage was resumed. It was held by the Court of Appeal that the charterer was liable to pay hire during the time occupied after leaving Queenstown in arriving back at the place where the accident had occurred.[v]

In *Lamb* v. *Kaselack*[w] a ship was chartered for a voyage under a charter-party which provided that the shipowners should have "an absolute lien on the cargo taken on board for all freight, dead-freight and demurrage." There was no stipulation for demurrage for detention at the port of discharge. After a partial cargo of guano had been loaded by the charterer, the bills of lading for which in favour of consignees bore express reference to the charter-party, the master, with concurrence of the charterer, shipped other goods belonging to a third party. At the port of discharge no consignee appeared to claim this portion of the cargo (which proved insufficient to pay its freight), and some delay took place, partly on this account and partly caused by the fault of the consignees of the guano. In a question between the shipowners and the consignees of the guano the Court of Session held (1) That the

No consignees claiming cargo.

[u] *Breda* v. *Ellingsen & Co.*, 1901, 8 S.L.T. 362.
[v] *Vogemann* v. *Zanzibar S.S. Co.*, 1902, Com. Cas. 254.
[w] 1882, 9 Sess. Cas. (4 ser.) 482.

guano was under lien for the freight of the whole cargo, but that it was not subject to lien for the unliquidated claim of damages for detention of the vessel at the port of discharge; and (2) that the consignees of the guano were liable for the detention only in so far as caused by their fault.

Charterers must name a quay that is ready.

By a charter-party it was agreed that the plaintiff's vessel, after loading a certain cargo, should proceed "to London or Tyne dock to such ready quay berth as ordered by the charterers, demurrage to be at the rate of £30 per running day," in no case, unless in berth before noon, were the lay days to count before the day following that on which the vessel was in berth, and the captain or owners were to have an absolute lien on the cargo for all freight and demurrage in respect thereof. The vessel was ordered by the charterers to a certain London dock, but when the vessel arrived at such dock there was no quay berth ready for her, and she was consequently detained one day beyond the time required for discharging her had she been able to have got alongside a quay berth on her arrival in the dock. The Court of Appeal held, on the construction of this charter-party that the charterers were bound to name such a quay berth as was ready, and that for the detention caused by the charterers neglecting to do so the plaintiffs were entitled to a lien on the cargo for demurrage, the damage for the detention being sufficiently in the nature of demurrage to come within the demurrage clause.[x]

In many cases the charter-party, instead of specifying any period as "demurrage days," requires that the loading or unloading shall be according to the custom of the port, and in such cases the charterer is not liable for impediments arising out of that custom.[y] Stipulations as to lay days and demurrage are applied strictly to those ports to which by the terms of the charter-party they relate. In the case of other ports not provided for, a reasonable time is allowed.

Consequential Loss for Detention.

Indemnity for consequential loss from detention of a vessel can only be recovered where there has been actual loss resulting therefrom, and reasonable proof

[x] *Harris* v. *Jacobs*, 1885, 15 Q.B.D. 247.
[y] *Wyllie* v. *Harrison*, 1885, 13 Sess. Cas. 4 ser. 92; *Castlegate S.S. Co.* v *Dempsey* (1892), 1 Q.B. 854; *The Alne Holme* (1893), P. 173.

of its amount. In estimating damages resulting from a collision, it was held by the Privy Council that a claim for demurrage during the detention of the injured vessel in port whilst a substituted vessel, belonging to the same owners, was doing, at the defendant's expense and indemnity for loss occasioned by the substitution, the work which the injured vessel ought to have done, must be disallowed.[a]

Weather.

After a ship has finished her loading the freighter is not liable for any delay that may arise in dispatching her, occasioned by the accidental impossibility of her obtaining clearance. Where there is a stipulation in a charter-party that a certain number of running days shall be allowed for loading the ship, the freighter is liable for her subsequent detention for that purpose, although the loading of her within the specified time was rendered impossible by ice in the river where she lay.[a] A charterer, for the conveyance of a cargo from a foreign port, is not liable to the owner for the unavoidable detention of the ship by the frost after the completion of the loading.[b] The exception in a charter-party, whereby a certain number of laying days is allowed to the charterer, but detention by ice is not to be reckoned as such, applies where the ice not only renders access to the ship impracticable in the port itself, but blocks up a river by means of which alone the intended cargo can be conveyed to the port.[c]

A, by charter-party, engaged to load on board B's ships a cargo of coals "with due dispatch," the goods to be brought by A along a canal to the dock, and frost prevented the completion of the loading. It was held that A was responsible for the delay consequent thereon.[d]

By a charter-party a ship was to proceed to Bilbao, and there load in the customary manner in regular steamer turn, when and as ordered by the agent of the freighter, a cargo of iron ore; 400 tons per working day, weather permitting, to be allowed for loading, and all demurrage over and above the said days at the rate

[a] *The City of Pekin*, 1889, 15 A.C. 438.
[a] *Barrett* v. *Dutton*, 4 Camp. 333. Waiting for convoy, see *Connor* v. *Smythe*, 1814, 5 Taunt. 654. [b] *Pringle* v. *Mollett*, 6 M. & W. 80.
[c] *Hudson* v. *Ede*, 37 L.J. Q.B. 166. Ex-Ch.
[d] *Kearon* v. *Pearson*, 7 H. and N. 386.

of 12s. 6d. per hour, no demurrage to be paid in case of any hands striking work, frosts or floods, which might hinder the loading of the vessel. The port of Bilbao was on a river where there were a number of wharves, and the iron ore was brought down to the wharves by railways from storing places five miles off, and loaded direct from the railway trucks into the ship by means of shoots, there being no storing-places at the wharves. Ships, however, were sometimes loaded while lying out in the river from barges which brought the ore from storing-places higher up the river. The ship was ordered to Ian Nicholas wharf to load, and she was there loaded under a shoot with ore brought down by rail, as above-mentioned. In consequence of heavy rains at the storing-places, and in consequence of the men who were loading the ore into the railway trucks there refusing to work from fear of the cholera, delay occurred, and the ship was detained waiting for her cargo. The Court of Appeal held, without deciding whether the refusal of the men to work came within the exception in the demurrage clause of "hands striking work," that neither the state of the weather nor the refusal of the men to work hindered the "loading," inasmuch as both those causes of delay operated before the ore arrived at the place of loading and the nature of the port was not such that the only possible mode of loading the ship was by bringing the ore by railway from the storing-places five miles off, so as to bring the case within the decision in *Hudson* v. *Ede* (*supra*).*

Drought, Storms, &c.

It was held by the American Courts in *Sorensen* v. *Keyser*† that when a ship is chartered in Liverpool to carry a cargo of lumber from Ship Island, and the charter-party provides that "in the computation of days allowed for delivery should be excluded any time lost by reason of droughts, floods and storms, or any other extraordinary occurrence beyond the control of the charterer," such exception does not apply to a drought existing at the time of the charter in the region of the Pascagoula river, and which prevented the charterer from obtaining the timber, but which did not interfere with its delivery from Moss Point, the usual

* *Stephens* v. *Harris*, 57 L.J. Q.B. 203.
† 52 Fed. Rep. 163.

place of preparing cargoes, and between which place and Ship Island no drought could affect the delivery. Under the terms of the charter, demurrage was to be paid for each "working day beyond the days allowed for loading." It was held that time lost by reason of storms before the beginning of the lay days, or after their expiration, could not be deducted in computing the demurrage.

In another American case, that of *Jonasen* v. *Keyser*,[s] the charter excluded from the computation of lay days at the port of loading "any time lost by reason of fire, droughts, floods, storms, strikes, lock-outs, combinations of workmen, or any extraordinary occurrence beyond the control of the charterers," and it was held that does not apply to time lost by reason of the charterers failing to have the cargo ready at the usual place of storage on account of a drought which was prevailing at the time of the charter, and which affected the rivers by means of which the cargoes were ordinarily brought from the interior, but did not in any way affect the delivery of cargoes from the usual place of storage to the ship. A charter contained the following provisions: "Demurrage to be paid for each working day beyond the days allowed for loading and discharging at 4d. per registered ton per day, and the charterers may keep the ship on demurrage ten days." It was held that the lost clause did not limit the time for which demurrage was recoverable, leaving the question of damages for a longer detention to be determinded by evidence, but that the stipulated rate was recoverable for each working day beyond the lay days allowed, whether more or less than ten days.

Frost preventing Loading.

By a charter-party a ship was to proceed to Cardiff, East Bute dock, and there load in the customary manner from the agents of the freighters a cargo of iron. "Cargo to be supplied as fast as steamer can receive. . . . Time to commence from the vessel being ready to load and unload and ten days, on demurrage, over and above the said lay days at £40 per day. (Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading

[s] 1901, 112 Fed. Rep. 443

. . . in which case owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from the charterers that they are ready to resume employment without delay to the ship.)" The ship arrived at the East Bute dock, and loaded part of her cargo. A frost then set in, and made a canal which communicated with the dock impassable, so that the remainder of the cargo which was ready at a wharf on the canal could not for several days be brought in lighters to the dock. The cargo could not have been brought into the dock by carting or otherwise at any reasonable expense. The dock itself was not frozen over, and if the cargo had been in the dock the loading might have proceeded. The House of Lords held, distinguishing the cases of *Allerton Sailing Ship Co.* v. *Falk*,[h] that the frost did not prevent the "loading" within the meaning of the exception.[i]

By a charter-party the charterers hired a steamship for two calendar months to be employed on a voyage to Spain, thence to the Baltic, and back to the United Kingdom or the Continent, as the charterers should direct. The charter-party provided that detention by ice should be for account of the charterers unless caused by breakdown of steamer. The steamer having proceeded to Spain, there loaded a cargo for St. Petersburg, and on her voyage there grounded in the Baltic, and put back to Copenhagen for the necessary repairs. Subsequently she proceeded on her voyage, and put into Reval, where she was detained in consequence of the port of St. Petersburg being closed by ice. If the ship had not grounded and received damage she could have reached St. Petersburg, discharged her cargo, and left the port before it was closed by ice. The Court of Appeal held, that the detention at Reval was a detention by ice caused by "breakdown of steamer," and that upon the true construction of the charter-party the hire ceased during the period of such detention.[j]

In *Allerton Sailing Ship Co.* v. *Falk* it was agreed by a charter-party that the charterer should not be

[h] 6 Asp. M.C. 287.
[i] *Grant* v. *Coverdale*, 53 L.J. Q.B. 462.
[j] *S.S. Richard Nordraak & Lennard*, In *re*, 8 Com. Cas. 239.

liable for delay in loading caused by neaps and stoppage of navigation, and the lay days were exceeded in consequence of the lighters which were bringing the cargo (one of salt) down the rivers Weaver and Mersey to Birkenhead, the place of loading, being delayed by neaps of exceptional lowness at the junction of the Mersey and Weaver, and it was proved that it is the invariable practice for all salt intended for foreign exportation to be brought to Birkenhead from the Weaver by water; that there are no storehouses for salt at Birkenhead; and that it is never kept there to await the arrival of vessels. The charterer was held to be relieved from liability under the above exceptions, upon the ground that they must be taken to apply to bringing the cargo to Birkenhead for loading purposes.

Ice.

No implied exemption for bad weather.

By the terms of a charter-party a ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of rail iron, the cargo to be loaded as fast as ship could take on board and stow within the customary working hours of the port, commencing when the ship was in berth and ready to load, "detention by frost, floods, etc., not to be reckoned as lay days." At Cardiff there are two docks, the East Bute Dock and the West Bute Dock, connected by a canal, and the West Bute Dock is connected by a junction canal with the Glamorganshire Canal. The shipowner, when the charter-party was made, did not know who were the freighters' agents at Cardiff. There were about six manufacturers of rail iron there, and all of them (with the exception of the freighters' agents) had wharves in the East or West Bute dock. The agent's wharf was on the Glamorganshire Canal, nearly opposite the junction canal, and their rail iron was loaded on ships berthed in the East Bute Dock by means of lighters passing down the junction canal, through the West Bute Dock, and from thence through the connecting canal to the East Bute Dock. The other manufacturers loaded ships in the East Bute Dock, either from the quay or by lighters coming from their wharves. The ship on arrival was berthed in the East Bute Dock, and the loading was commenced, but it was delayed

afterwards for sixteen days by frost, which covered with ice the junction canal, from the agent's wharf to the West Bute Dock, and prevented there the passage of the lighters, though the water in the docks was not frozen. The Court of Appeal held that the exception in the charter-party with respect to detention by frost did not apply to relieve the freighters from liability for demurrage, as the lighters with the cargo for the ship had not got within the limits of the East Bute Dock, where the ship was to be loaded, before the detention by frost had happened.[k]

Where by a charter-party a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay days. Where the shipowner is prevented from unloading and the charterer from receiving the cargo by stress of weather after the arrival of the ship the charterer is liable under the above rule.[l]

Snowstorm.

A charterer agreed to load a ship with coal, in regular and customary turn, "except in cases of riots, strikes, or any other accidents beyond his control" which might prevent or delay her loading. It was held that a snowstorm was not an "accident" within the meaning of the exception.[m]

Surf preventing Loading.

In an outward and homeward charter-party a certain number of days were allowed for discharging the outward and loading the homeward cargo. In an action for demurrage it was held by the Court of Session that days on which the loading and discharging could not be carried on at the foreign port because of the surf were working days. It was also held that it was within the master's power to grant the charterers additional lay days in consideration of their giving up an option to load at certain by-ports; but that he had no power to give a discharge of any demurrage-money payable to the shipowners except on payment.[n]

[k] *Kay* v. *Field*, 10 Q.B.D. 241.
[l] *Tus* or *Thus* v. *Byers*, 24 W.R. 611; see *Budgett* v. *Bennington*.
[m] *Fenwick* v. *Schmalz*, 18 L.T. 27.
[n] *Holman* v. *Peruvian Nitrate Co.*, 5 Ct. of Sess. Cas. (4 ser.) 657.

Not producing Bill of Lading.

Where, by the terms of the charter-party, the cargo is to be cleared within a time specified, certain laying days being given, on arriving at the port of discharge, the master's duty is to deliver the cargo to the holder of the bill of lading, and that of the charterer to unload within the given time; and on the holders of the bill of lading failing to present it within such given time the charterer is liable for demurrage and the detention of the ship, so long as that detention and demurrage.[o]

Strikes.

The term "strike" in a charter-party must be used in the ordinary sense of strike against employers. The abandonment of their work by miners through dread of cholera does not bring the charter of a ship within the exception in a charter-party against "hands striking work" so as to relieve him from payment of demurrage.[p]

The term "strike" contained among the exceptions as to the running of lay days stipulated for in a charter-party should be accepted in its ordinary sense, as meaning that the charterers should be excused for any delay occasioned by a refusal of all the available workmen to work except charterers should pay an advance in wages made or demanded in the midst of the loading of a vessel, after the contract of the charterers and owners had been made upon the basis of wages formerly paid.[q]

A cargo was shipped under a bill of lading incorporating a clause in a charter-party which fixed the number of lay days for unloading and allowed other days for demurrage. Neither the bill of lading nor the charter-party contained any exception of strikes. By the custom of the port of discharge cargoes were unloaded by the joint act of the shipowner and the consignee. During the lay days a strike took place, both among the labourers employed on behalf of the ship and those employed by the consignees, with the result that the unloading ceased, and could not be resumed till some days after the expiration of the lay days. The Court of Appeal held that as the number of lay days

[o] *Ericksen* v. *Barkworth*, 1858, 28 L.J. Ex. 95.

[p] *Stephens* v. *Harris*, 56 L.J. Q.B. 516; affirmed on other grounds, 57 L.J. Q.B. 203. See also *Granite City Steamship Co.* v. *Ireland*, 19 Ct. of Sess. Cas. (4 ser.) 124; *Hick* v. *Raymond*, 62 L.J. Q.B. 98, H.L. (E).

[q] *Wood* v. *Keyser*, 1897, 84 Fed. Rep. 688.

allowed for the discharge was fixed, the consignees were liable to pay demurrage, notwithstanding the inability of the shipowners, owing to the strike, to do their part in the unloading.[r]

Where a charter-party provides that the ship shall proceed to one of certain named places as ordered, and there deliver the cargo to the order of the charterers, the charterers being exempted from liability for delay caused by strikes; the charterers having named the place of discharge are not bound to alter their orders on obtaining knowledge of a strike at the place named that will interfere with the unloading in cases where they could have stopped the ship proceeding to the named place. The charterers in such a case are, therefore, not liable for demurrage.[s]

A charter-party provided that the ship (a sailing ship) should, at Sydney, load coals to be brought alongside at merchant's risk; the coals to be loaded as customary at Sydney with an exception of charterers' liability in case of strikes "or any other hindrances of what nature soever beyond the charterers' or their agents' control." There was a strike at another colliery which threw a pressure of work on the loading colliery, and the ship was delayed. The Court of Session held that the delay was not due to a "hindrance" and that the charterers were liable for demurrage.[t]

By a charter-party it was provided that the ship should proceed to Cardiff and there load "a cargo of steam coal as ordered by charterers," which the charterers bound themselves to ship, "except in the event of strike of shippers' pitmen," the vessel to be loaded as customary, "but subject in all respects to the colliery guarantee in —— colliery working days as may be arranged." The charterers bought a cargo of steam coal from a colliery; subsequently a strike took place which extended to 85 per cent. of the collieries in South Wales, including the said colliery. While the strike still continued the charterers obtained from the said colliery and sent to the shipowners the usual guarantee by which the colliery proprietors undertook to load the

[r] *Budgett* v. *Bennington*, 60 L.J. Q.B. 1. See also *Tas* v. *Byers*.
[s] *Bulman* v. *Fenwick* (1894), 1 Q.B. 179 C.A.
[t] *The Gardiner* v. *Macfarlane*, 20 Ct. of Sess. Cas. (4 ser.) 414.

ship in twenty days after she should be ready to receive cargo, subject to the usual exception as to strikes. The shipowners objected to this guarantee because the colliery was on strike, and required the ship to be loaded from a colliery which was working. The ship then went to Cardiff and, owing to the continuance of the strike, was delayed for three months. The shipowners claimed damages for the delay from the charterers. The Court of Appeal held that the charterers were entitled to select the colliery, which they did in fact select, although it was on strike, and that they were not liable for the delay of the ship.[u]

By a charter-party it was agreed that the ship should load from charterers' agents a cargo of petroleum in cases, lay days for loading to commence twenty-four hours after the receipt by the charterers' agents of written notices of steamer's readiness in berth to receive, strikes, lock-outs, accidents to railway . . . or other causes beyond charterers' control excepted. The railway, which brought the oil in tanks to the port of loading, being partially destroyed by floods, the charterers' agents dismissed the men employed at their factory in packing the oil in cases. On the re-opening of the railway, sufficient supplies of oil were received at the factory, but owing to the absence of men the production of filled cases was delayed. The charterers' agents also, in accordance with the practice of shippers at the port, deferred the loading of the ship until they had loaded other ships which had arrived previously, and been delayed in loading by the same causes. The lay days having been exceeded, the Court of Appeal held that the lay days commenced to run as soon as sufficient oil had arrived to enable the work of filling cases to be resumed; that the failure to load the ship within the lay days was not owing to "strikes, lock-outs, accidents to railway . . . or other causes beyond the charterers' control," within the meaning of the charter-party; and that the shipowners were entitled to damages for detention.[v]

Strikes and Lock-outs of Pitmen.

The defendants chartered the plaintiff's ship to proceed to Ardrossan, the charter-party providing that the

[u] *Dobell* v. *Green*, 82 L.T. 314.
[v] *Richardsons & Samuel & Co.* in *re*, 66 L.J. Q.B. 868.

ship should there load "in the customary manner, say in twelve colliery working days," a cargo of coals, "to be loaded according to the custom of the port," "strikes and lock-outs of pitmen and others" being excepted perils. The following written clause was added: "It is understood that the vessel is to be loaded at once, and lay days to count when vessel ready and notice given." The ship arrived at Ardrossan, and gave notice that she was ready to load; but before twelve working days had elapsed a strike broke out at the pit, in consequence of which the ship did not load the cargo of coal till twenty-three ordinary working days had elapsed. The plaintiff claimed for fifteen days' demurrage. It was held that the written clause only fixed the time when the lay days began, and that the delay was caused by an excepted peril.[w]

No time mentioned—Unavoidable delay.

Where a charter-party is silent as to the time within which the cargo is to be unloaded at the port of destination, the law implies that the merchant and the shipowner shall each use reasonable dispatch in performing his part of the contract, and where the loading of the cargo by the merchant is rendered impossible by a cause over which he has no control, he is not liable to pay damages for the delay.[x]

Time fixed.

Where a charter, by stipulating the rates of discharge, has fixed definitely the time for its completion, the charterers are liable for delay beyond that time, though caused by the acts of the public enemy and without fault of the charterers or consignees.[y]

Where Contract violates Law.

When the contemplated mode of carrying out of the contract is, without any intention of the parties thereto, illegal, the contract remains valid and enforceable, if the performance thereof in any other manner is legal and practicable; and in order to avoid a contract which can be legally performed, on the ground that there has been an intention to perform it in an illegal manner, it is necessary to show that there was a guilty intent to break the law. A charter-party was made in France between the defendant's agent and the master of

[w] *Peterson* v. *Dunn*, 43 W.R. 349.
[x] *Ford* v. *Cotesworth*, 10 B. and S. 291. See also *Weir* v. *Richardson*, 3 Com. Cas. 20.
[y] *Burrill* v. *Crossman*, 1895, 69 Fed. Rep. 747.

the plaintiff's ship: it was stipulated that the ship should proceed to T., a port in France, there load a cargo of hay, and proceed therewith to London, and that all cargo should be brought to and taken from the ship alongside. The defendant's agent told the master that the consignees would require the hay to be delivered at a particular wharf. On arriving in the Thames, the master for the first time learnt that by an Order in Council made under the Cattle Diseases Act, France was declared to be an infected country, and it was made illegal to land in Great Britain any hay brought from that country. The master, therefore, did not proceed to the wharf, and after some delay the defendant received the cargo from alongside the ship in the river and exported it, during the interval, eighteen days beyond the lay days elapsed: It was held that the plaintiff was entitled to recover for the detention of the ship.[5]

Cargo not allowed to be landed.

A ship with a general cargo sailed from London for Havre with some petroleum on board Under the bill of lading the shipowner was to deliver the petroleum at Havre, and it was to be taken out by the defendant within twenty-four hours after arriving at Havre, or ten guineas a day was to be paid for demurrage. On the ship's arriving at Havre, the authorities of the port made the captain take her away in consequence of the petroleum being on board. Thereupon he went to neighbouring ports, but was not allowed to stay. Returning to Havre, he discharged his general cargo, and notice of lading having been presented to him, and no application having been made to him for the delivery of the petroleum, he brought it back to London. It was held that the shipowner was entitled to freight, back freight, and expenses. The demurrage and the expenses incurred, and in the ineffectual attempts to load at neighbouring ports were not allowed, but were looked on as part of the expenses of the voyage.[6]

Exportation not permitted.

Where there was a contract to fetch corn, and demurrage allowed, and upon the ship's arrival it was found that the government had prohibited the ex-

[5] *Waugh* v. *Morris*, 1873, 21 W.R. 438.
[6] *Argos* (Cargo ex.) *Gaudet* v. *Brown*, 28 L.T. 745.

portation of corn, which fact the captain knew before he entered the port, but still did so, and having stayed his demurrage days, returned in ballast, it was held that no demurrage was payable.[b]

Unlawful Seizure by Custom House Officers.

It is no defence to an action for demurrage that the delay in unloading the ship arose from the act of Custom House officers in unlawfully seizing a part of the cargo.[c]

Wrongful Detention by Owner.

By charter-party between plaintiff, the owner, and defendants, freighters of a ship, it was agreed that defendants should have eighty-five running days for loading and unloading, and might keep the ship fourteen days longer on demurrage, at so much per day. Plaintiff alleged that he was always ready and willing to perform his part of the contract, but that defendants kept the ship fourteen days on demurrage beyond the eighty-five, and thereby became liable to pay £119, and also kept her eight days beyond the fourteen. It was proved that during the running days, and when the vessel had been three days unloading, plaintiff wrongfully stopped the unloading for two days, at the end of which the running days, if reckoned consecutively, expired. That the unloading was then continued for two days and again wrongfully interrupted by plaintiff for several days; after which it was resumed and the unloading completed, having occupied twelve or thirteen days, not reckoning days of stoppages. It was not shown by direct evidence that the unloading, while carried on, had proceeded more slowly in consequence of the interruptions. It was held that under these circumstances the plaintiff could not recover upon the charter-party for demurrage, or for detention of the ship beyond the fourteen days; but that the mere fact of an interruption for however short a time would not discharge the defendants from their obligation under the charter-party.[d]

Procuring necessary papers.

The consignee of a particular parcel of goods by a general ship is liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity for an order from the Treasury

[b] *Blight & Page*, 3 Bos. and P. 295 n.
[c] *Bessey* v. *Evans*, 4 Camp. 131.
[d] *Benson* v. *Blunt*, 1841, 1 Q.B. 870. See *Elliott* v. *Lord*, 48 L.T. 542.

to land these goods, which the consignees used the utmost diligence to obtain.[e] It is no defence to an action by the owner of a ship for demurrage that the owner has omitted to procure the necessary papers for the discharge of the cargo, if he omitted to do so at the request of the defendant.[f]

Queen's Enemies.

When a charter-party contains the exception, "Queen's enemies," an apprehension of capture founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience will justify delay in port during the continuance of the risk; nor is such delay less justifiable in the case of a ship belonging to a belligerent nation, but carrying a neutral cargo.[g]

Civil Commotion.

When a charterer, by his charter-party, undertakes to load a ship within certain given lay days, "accidents or causes occurring beyond the control of the shippers or of freighters, which may prevent or delay her loading or discharging, including civil commotion, strikes, riots, etc., always excepted," or to pay demurrage, he cannot excuse default in loading within the lay days by giving evidence of general disturbance and cessation of work in the district about the time; but to exempt himself from liability must show a disturbing cause actually preventing the loading of the particular ship.[h]

Political Disturbances.

In *Smith* v. *Rosario Nitrate Co.*[i] the defendants chartered the plaintiffs' vessel to load a cargo of nitrate at Iquique, in Chili, at the rate of 200 tons per working lay day, to be reckoned from the day the vessel was ready to receive cargo to the day of her dispatch, "restraints of princes and rulers, political disturbances, or impediments during the said voyage always mutually excepted." The charter-party gave the ship liberty to call at any ports in any order. There was at Iquique only storage for a small quantity of nitrate, and the customary mode of loading there was to send the nitrate down direct by rail from the mines to the

[e] *Hill* v. *Idle*, 1815, 4 Camp. 327.
[f] *Furnell* v. *Thomas*, 5 Bing. 188.
[g] *San Roman*, 28 L.T. 381. See *Hadley* v. *Clarke* (1790), 8 T.R. 259; *Harrison* v. *Wilson* (1790), 2 Esp. 708.
[h] *The Village Belle*, 30 L.T. 232.
[i] 1894, 1 Q.B. 174.

port, and there put it on board ship as required. When the plaintiffs' vessel arrived at Iquique, a civil war had broken out in Chili, and delay occurred in loading the vessel, in consequence of the railway from the mines to Iquique being in the hands of the troops, so that nitrate could not be sent down from the mines to the port. That state of things subsequently ceasing, the cargo was loaded and the vessel sailed upon her voyage. Being short of coal, which was very dear at Iquique, she put into another Chilian port for it. The Chilian Government in power there demanded payment of export duties, such duties having already been paid to the *de facto* Government in power at Iquique, and the ship was detained there for ten days in default of payment of such duties. An action having been brought by the plaintiffs for demurrage, the Court of Appeal held that both the above-mentioned delays fell within the exception clause in the charter-party.

Default of Stevedore.

By a charter-party it was agreed that the ship should proceed to Leith and to London, and there load cargo to be shipped by the charterers; and that a stevedore should be "appointed by the charterers in London only, but employed and paid for by owners." Cargo was loaded at Leith by the charterers, no information as to the London cargo being then asked for by the captain. On the voyage to London, owing to bad weather, some of the cargo was damaged and some was shifted. After the arrival of the vessel at London, it was necessary to land the damaged cargo to be re-conditioned, and to re-stow the cargo which had shifted. It also became necessary to shift some of the cargo to enable the London cargo to be properly stowed. Owing to these matters, and to some delay on the part of the stevedore who had been appointed under the terms of the charter-party, three days more than those allowed by the charter-party were occupied in loading at London. The Court of Appeal held that the stevedore was the servant of the owners, and that the charterers were not liable for demurrage arising either from his delay or from the necessity of moving the cargo; and that the charterers were not

liable for any of the expenses of moving the cargo because they were either expenses of stowage or of work done for the benefit of the cargo without the authority of the charterers.[j]

Delays caused by accident to "Works or machinery."

By a clause of exceptions in a charter-party for a cargo of iron ore, it was provided that any time . . . of accidents to the mines, works, or machinery . . . or time when by any cause of what kind or nature soever beyond their personal control, the charterers or their agents might be prevented or delayed in supplying, loading, or discharging, or the conveyance of the cargo from the mines to the vessel might be prevented or delayed, should not be computed as part of the running days allowed for loading or unloading. It was held by the Court of Session of Scotland that a detention caused by the temporary disrepair of a gantry or lift in the consignee's premises which was not immediately concerned with the operation of discharging from the ship, was not covered by this exception clause, and that the charterers were liable in demurrage.[k]

Consignee unable to get cargo through default of another Consignee.

In *Straker* v. *Kidd*[l] the defendant was one of several consignees of cargo which had arrived by the plaintiff's steamer. The bill of lading under which the defendant took the cargo contained the following clause: "Three working days to discharge the whole cargo, or £30 sterling per day demurrage." The defendant was ready to take his cargo within the three days, but the master of the ship could not deliver it to him, as it lay under goods belonging to other consignees who failed to take them in due course. Neither the plaintiff nor the defendant was to blame, but, as the defendant had left his goods incumbering the plaintiff's ship after the three days, it was held that he was liable for demurrage. In *Porteus* v. *Watney*[m] the defendant received goods from the plaintiff's steamer under a bill of lading, which contained the words, "paying freight for the said goods and all other conditions as per charter-party." By the latter instrument seven days were allowed for discharging. The defendant

[j] *Harris* v. *Best*, 1892, 7 Asp. M.C. 272.
[k] *Aktieselskabet "Primate"* v. *Macleod & Co.*, 1903. (O.H.) 11 S.L.T. 440.
[l] 1878, 3 Q.B.D. 223.
[m] 3 Q.B.D. 227, 534.

was ready to take his goods during that time, but was unable to get them owing to the default of another consignee, whose cargo was uppermost. This defendant was also held liable for demurrage.

Straker v. *Kidd* and *Porteus* v. *Watney* overrule *Rogers* v. *Hunter* and *Dobson* v. *Droop*, in which Lord Tenterden, at *nisi prius*, had expressed an opinion that a consignee who had no opportunity of taking his goods within the time stipulated, could not be said to detain the vessel if he removed them within a reasonable time after he was able to reach them. In *Porteus* v. *Watney*,[n] dealing with the contract then before the Court, said:—"It is not that the holder of the bill of lading will discharge his cargo within a reasonable time after he is able to do so; it is that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the place of discharge, the holder of that bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused, unless it is by default of the shipowner."

Subsequently, in *Postlethwaite* v. *Freeland*,[o] Lord Selborne said in the House of Lords:—"If by the terms of the charter-party he (the charterer) has agreed to discharge it (the cargo) within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated.[p]

In *Leer* v. *Yates*[q] a general ship took brandies on board under bills of lading, which allowed twenty lay days for delivery of the goods in London, and stipulated for £4 per day demurrage; afterwards, certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the London docks until forty-six days after the twenty days; and some of the goods which were undermost

[n] 3 Q.B.D. p. 542. [o] 1880, 5 A.C. p. 608.
[p] See also *Wegener* v. *Smith*, 15 C.B. 285; *Chappell* v. *Comfort*, 10 C.B. N.S. 882; *Gray* v. *Carr*, 40 L.J. Q.B. 257; *Thin* v. *Byers*, 45 L.J. Q.B. 511; *Fry* v. *Chartered Bank of India*, 14 L.T. 709
[q] 3 Taunt. 387.

could not, though demanded, be taken out till the upper tiers were cleared. It was held that each of these consignees was liable to pay the £4 per day for the forty-six days.

In *Harman* v. *Gandolph*[r] a general ship took some silk on board to carry from Rotterdam to London on the defendant's account. On the margin of the bill of lading was written: "The consignee to clear the goods in fourteen running days after her arrival in port, or to pay £4 per day for demurrage." The vessel was ready to deliver on the 3rd October. The defendant applied for, and was ready to receive, his goods within the running days; but being undermost in the vessel delivery could not be made until the 22nd. It was held that the plaintiff was entitled to recover the demurrage, though he did not deliver the goods within the time allowed, being prevented by other goods belonging to other consignees which overlaid them.

Refusal of Master to take goods on board.

A charter-party provided that if the ship were not ready, either on the owner's or charterer's part, at dates named, then demurrage to be paid by the party in default. This demurrage clause was held not applicable in case of delay caused by the master refusing to take on board goods which he erroneously thought he was not bound to take.[s]

State of tides

On a charter-party, by which the ship was to unload "at a certain wharf, or as near thereto as she can safely get," the ship not being able for some days to get there, owing to the state of the tides, it was held that "at" meant "alongside," and that the charterer was not liable to demurrage for the delay, though it was not usual in the particular port for ships to be unloaded into lighters.[t] Where, by a charter-party, a vessel is to go to a certain port, or so near thereto as she may safely get, and there load a cargo and bring it home, and the vessel goes to the port in question and loads the cargo inside the harbour, for which cargo the master signs bills of lading, but finds that with such cargo on board the vessel cannot pass the

[r] Holt, 35.

[s] *Seeger* v. *Duthie*, 8 C.B.N.S. 45.

[t] *Bastifell* v. *Lloyd*, 1862, 10 W.R. 721.

bar of the harbour, here, the charterer having done all that was required of him, may refuse to put the cargo on board a second time (outside the bar), and the vessel sailing away without the cargo, the charterer is not liable for the freight stipulated for by the charter-party, or to damages for the refusal to ship the cargo[u]

Whether a partial putting out of the cargo is a part discharge or a mere lightening, is to be determined in each case by the jury, having regard to the terms of the contract and the usage of the port.[v]

Neglect of Consignee to pay Harbour Dues.

Demurrage cannot be claimed for detention of a ship for harbour dues payable by the consignee, the master having delayed to pay them; his duty being to pay them without delay, and recover from the consignee.[w]

Dispute as to Freight.

A dispute arose between the shipowner's broker abroad and the charterer's broker, as to who was entitled to collect freight. The former, contrary to the provisions of the charter-party, insisted upon his claim, and put a stop upon the cargo; whereby the charterer became liable to the cargo owner for demurrage. It was held that the charterer was entitled to recover damages in respect of the demurrage against the shipowner.[x]

Refusal to deliver goods on account of non-payment of Freight.

By a charter-party, the plaintiff, a shipowner, agreed with the freighter to deliver cargo on payment of freight as by bills of lading; certain lay days were allowed, and demurrage afterwards at a given rate. The bills of lading provided for delivery to the freighter or his assigns on payment of freight as by charter-party. Defendant, an assignee of the bill of lading, sent his lighters for the goods, and received part. Plaintiff demanded payment of freight for the part delivered, and defendant refused it. Plaintiff refused to deliver more cargo, and the running days expired. Soon after the plaintiff delivered the rest of the cargo, and was paid freight. It was held that the defendant was not liable for demurrage, or for not

[u] *General Steam Navigation Co.* v. *Slipper*, 11 C.B.N.S. 493.
[v] *McIntosh* v. *Sinclair*, Ir. R. 11 C.L. 456
[w] *Moller* v. *Jecks*, 19 C.B.N.S. 332.
[x] *Bradley* v. *Goddard*, 3 F. and F. 638.

receiving the goods within a reasonable time by reason of his non-payment of freight demanded.[r]

Convoy recalled

Under an agreement in the nature of a charter-party, whereby the plaintiff let his ship to freight to the defendant on a voyage from Shields to Lisbon, with convoy, the freight to be paid on right delivery of the cargo; the ship having sailed from Shields with her cargo, and joined convoy at Portsmouth; and, after being detained near a month off Lymington, her sailing orders being recalled by the convoy, in consequence of the occupation of Portugal by the enemy, and the defendant having refused to accept the cargo at Portsmouth, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendant, and then was sold by consent of both parties without prejudice. It was held that he could not recover freight *pro rata*, or demurrage.[s]

Cargo not ready

See *Lilly* v. *Stevenson*.[a]

Stopping Discharge to obtain Security for Freight.

A charter-party provided that part of the freight should be payable on arrival, "and the remainder after unloading and on right delivery of the cargo." It also provided that the owners should have a lien "for all freight, dead freight, and demurrage." The ship, in the course of delivering a cargo of timber, suspended delivery for two days till the consignee should find security for the freight. In an action for two days' demurrage, it was held that the shipowners were not entitled to demurrage, as they might have completed unshipment of the cargo, and yet retained their lien.[b]

Where demurrage was to be paid for every day beyond a stated number that the ship should "wait for convoy," it was held that the sailing, and not the arrival, of convoy was intended.[c] A charter-party contained a covenant to take in cargo and sail from O. with the first convoy for England fourteen days after the vessel was ready to load; the freighter covenanting to load within fourteen days after notice that she was

[r] *Young* v. *Moller*, 5 El. and B.L. 755.
[s] *Liddard* v. *Lopes*, 10 East. 526.
[a] 22 Ct. of Sess. Cas. 4 ser. 278.
[b] *Thorsen* v. *McDowell*, 1892, 19 Ct. of Sess. Cas. (4 ser.) 744. See also *Aktieselkab Helios* v. *Ekman* (1897), 2 Q.B. 83.
[c] *Lannoy* v. *Werry*, 4 Bro. P.C. 630.

ready to load; the freighter to be at liberty to detain the ship fifteen days on demurrage at four guineas per day. The freighter kept the ship fifteen days on demurrage, during which a convoy sailed for England, and completed the loading two days before the next convoy sailed, after the expiration of the fifteen days, and thirty-eight days after that date. It was held that on paying for the fifteen days' demurrage the freighter was in the same position with regard to the ship sailing as he would otherwise have been in at the end of the fourteen days, and that he was liable for fifteen days' demurrage, and not thirty-eight additional days, as claimed.[d]

A charter-party provided that the ship should "join convoy, and that forty-one days should be allowed for waiting at Portsmouth to join convoy and discharging at Barcelona," demurrage to be paid for all the time beyond. The ship arrived at Portsmouth too late for the convoy at Barcelona, and consquently had to join other convoys from Portsmouth to Falmouth, thence to Gibraltar, and thence to Barcelona. It was held by Lord Kenyon that demurrage was only payable under the contract for delays at Portsmouth and at Barcelona, and not for the detentions which occurred at Falmouth and Gibraltar.[e]

Towage contract.

Tug owners agreed to tow a ship from one port to another, demurrage payable to them at £10 per day unless detained by stress of weather, "no extra charge to be made in case of accident, unless for detention arising therefrom, to be paid for as per rate mentioned above." The tow-rope parted in a gale, and the tug and tow put into a port of refuge, where they were detained seven days by weather. No fault was proved on either side. It was held by the Court of Session of Scotland that demurrage for seven days was payable.[f]

When work done by independent authority.

The work of loading or discharging is usually a joint operation done by the freighter or consigner on the one hand, and the shipowner on the other hand. But sometimes, by the law or custom of the place, that

[d] *Connor* v. *Smythe*, 5 Taunt. 654.
[e] *Marshall* v. *De la Torre*, 1 Esp. 367. See *Thompson* v. *Inglis*, 1813, 3 Camp. 428.
[f] *New Steam Tug Co.* v. *McClew*, 7 Ct. of Sess. Cas. (3 ser.) 733.

work is done by neither of them, but by third persons (such as a dock authority) who act for them both. Where that is the case, and where there has been no undertaking that the work shall be completed in a fixed time, it would seem that the merchant will not be liable for a delay, although unreasonable, caused by the authority doing the work, unless he in some way brought it about.

Duty of Consignee in taking delivery.

By a charter-party for the carriage of a cargo of poles and spars it was agreed that the ship should "discharge overside in the river or dock into lighters or otherwise if required by the consignees." The ship was discharged into lighters, and the lay days were exceeded because the consignees did not put enough men on the lighters to receive the poles and spars when they were brought over the ship's side by the crews and placed within reach of the men in the lighters. It was held by the Court of Appeal that it was not the duty of the shipowner to put the poles and spars into the bottom of the lighters, and that the consignees were liable to pay demurrage.[g]

In *The Jaederen*[h] a charter-party provided that the vessel should proceed to a named dock, and should there be discharged as fast as she could deliver. On the ship's arrival, the master authorised the dock company to discharge the cargo. The custom at the dock was for the company to discharge the cargo, acting for the shipowner and the charterer or consignee. It was held that the customary mode of discharge was implied, and that the charterers were not liable for demurrage by reason of the dock company's delay in discharging the cargo.[i]

Cargo must be ready.

But though the charterer, where no time is fixed for loading or unloading, is not compelled to have the work finished in any particular time, and is excused if the work is delayed by causes beyond his control, that applies only to the actual work of loading or unloading. Unless expressly excused, the charterer is bound to be ready to proceed with the work without delay.

[g] *Petersen* v. *Freebody*, 1895, 2 Q.B. 294.
[h] 1892, P. 351.
[i] See also *Castlegate* v. *Dempsey* (1892), 1 Q.B. 854.

The cargo must be ready at the proper place for loading. And if it is the charterer's duty to provide the apparatus for loading or unloading, that also must be ready. The charterer cannot set up the excuse of *vis major* for delay in these matters. In the absence of express qualifications, the undertaking of the charterer to supply a cargo is absolute. And, further, he undertakes absolutely that the cargo shall be ready at the place at which the loading is agreed to be done. Any difficulty that may arise in bringing the cargo to the place of loading cannot be a matter of excuse in estimating whether proper dispatch has been used, unless it is covered by an express stipulation.[j] But there is sometimes a difficulty in saying where in the port the cargo is to be assumed in readiness. In *Hudson* v. *Ede*[k] it was held that "whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship," the exception ("detention by ice and quarantine") would apply. Lord Selborne L.C., in *Grant* v. *Coverdale*,[l] said :—"The case of *Hudson* v. *Ede* (*supra*) was referred to. I understand that case as proceeding upon the same principles, but as containing an admission of this distinction, that where there is, in a proved state of facts, an inevitable necessity that something should be done in order that there should be a loading at the place agreed upon—as, for instance, that the goods should be brought down part of a river from the only place from which they can be brought, even though that place is a considerable distance off, yet it being practically, according to known mercantile usage, the only place from which they can be brought to be loaded, the parties must be held to have contemplated that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment."

[j] *Stephens* v. *Harris*, 57 L.J. Q.B. 203; *Adams* v. *Royal Mail Steam Packet Co.* 28 L.J. C.P. 33; *Kearon* v. *Pearson*, 31 L.J. Ex. 1; *Elliott* v. *Lord*, 48 L.T. 542; *Fenwick* v. *Schmalz*, L.R. 3 C.P. 313.

[k] L.R. 3 Q.B. 412. [l] 9 A.C. 477.

[m] See also *Allerton Sailing Ship Co.* v. *Falk*, 6 Asp. M.C. 27; *Smith* v. *Rosario Nitrate Co.* (1894), 1 Q.B. 174; *Furness* v. *Forwood*, 77 L.T. 95; *The Rookwood*, 10 T.L.R. 314; *Kay* v. *Field*, 8 Q.B.D. 594; *Jonasen* v. *Keyser*, 1901, 112 Fed. Rep. 443.

Cargo from agreed place—Known source of delay.

On the other hand the charterer cannot be assumed to have the cargo ready if it is expressly to be provided from a particular place, and the charter has been made in view of circumstances by which, as the parties know, the procuring of a cargo from that place may be delayed; and if, in such a case, no arrangement is made as to the time in which the loading is to be done, the charterer will be allowed a reasonable time for getting the cargo, having regard to the known sources of delay. In *Harris* v. *Dreesman*,[a] the master of a vessel by a charter-party engaged to proceed with his vessel to a particular colliery, and there take on board for the freighters a cargo of coal. Before the charter-party was signed both parties knew that the colliery was not at work, an accident having happened to the steam engine, and both were told it would be repaired in a short time, and that the vessel would be loaded in her turn within a few days after the colliery got to work again, according to the practice of the port, which was that ships were loaded in their regular turns as they were entered on the colliery books. The freighter had no control over the colliery. The ship was loaded in her turn, but not until several days later than the colliery agents had led the parties to expect. It was held that if the steam engine was repaired, and the colliery got to work in a reasonable time after the execution of the charter-party, and if the vessel was loaded within a reasonable time after the colliery got to work, the freighters were not liable to compensate the master of the vessel for the delay in the loading.

In *Jones* v. *Green*[b] the defendants chartered the plaintiffs' vessel to load in the usual and customary manner in regular turn a cargo of coals at Newcastle, New South Wales, from a colliery to be named by the charterers, who named a particular colliery whose coal was in great demand. By the custom of the port a berth cannot be obtained until a coaling order from the colliery is produced. These facts were known to both parties, and no time for loading was fixed. Owing to the charterers not being able to obtain a berth earlier,

[a] See Carver on Carriage by Sea, Sec. 254.
1854, 23 L.J. Ex. 210.
[b] 73 L.J. K.B. 601.

a delay of some eighty days occurred. In an action by the shipowners for damages, the Court of Appeal held that the obligation of the charterers to have a cargo ready was discharged if the vessel got her due turn from the particular colliery, and that under the charter-party and the circumstances within the knowledge of both parties at the date of the charter-party, the charterers had not acted unreasonably and were not liable for the vessel's detention.[p] Vaughan Williams L.J.[q] says:—"In determining what is a reasonable time, it seems to be obvious that you must have regard to the circumstances which were known to both parties at the date of the contract, and must have been taken into consideration by both as affording the basis and foundation of the contract."

Loading Berth not ready.

Although a shipper or charterer is bound to do whatever is reasonable on his part with a view of getting the ship berthed as soon as possible, it is not his duty in all circumstances to have the cargo ready for loading on the bare chance that a berth may be vacant. By a charter-party a ship was to go to a certain port to receive a cargo supplied by the charterers and brought alongside within sixty running hours. Demurrage to be paid at a specified rate, and "lay days to count from the time the master has got ship reported, berthed and ready to receive cargo, and given notice of the same in writing to the charterers." When the ship arrived, of which due notice was given to the charterers, the docks were too crowded to admit of her entering. Two days afterwards a berth became vacant in consequence of the non-arrival of the cargo of an earlier vessel, and the appellant's ship might have entered if her cargo had been ready. She was not, in fact, docked until five days later. The House of Lords held that the appellant was not entitled to any damages by way of demurrage.[r] Lord Herschell said:[s] "I do not for a moment deny that he (the charterer) is bound to do whatever is reasonable on his part, with the view of getting the ship berthed at the

[p] See also *Little* v. *Stevenson* (1896), A.C. 108; *Grant* v. *Coverdale*, 9 A.C. 470.

[q] (1904), 2 K.B. p. 280

[r] *Little* v. *Stevenson* (1906) A.C. 108.

[s] (1906) A.C. p. 119.

earliest period that is reasonably possible; and it may be that in certain circumstances, owing to the custom of the port, owing to contingencies of this kind being very common, owing to the provision that is made to facilitate cargo remaining there for a few days, and a variety of other circumstances, it would be the duty of the shipper to be prepared by having his cargo there to enable the vessel to obtain an earlier berthing than would otherwise have been obtained. All that, I say, may be the case; but no such facts are found in the present case."

In *Hine* v. *Perkins*[1] a chartered vessel reached the port of New York, and proceeded to the designated pier at 8 a.m. December 10th, but finding the berth occupied, she sought an anchorage. The charterers were notified by 11 a.m. that she would be ready to unload at 7 a.m. the next day. Early in the morning, December 11th, she proceeded to the pier, and finding the berth still occupied, she went back to her anchorage. The berth was ready for her by 11 a.m., but she did not return until evening, and commenced to unload on the 12th. It was held that as the charterers provided a berth within twenty-four hours after notice of arrival they were not liable for the delay.

Obligation to have cargo ready.

By a charter-party dated May 30th, 1900, which did not fix the time within which the vessel was to be loaded, the steamship *Ardandearg*, of which the plaintiffs were owners, was chartered by the defendants to proceed to such loading berth as the freighters might name at Newcastle, New South Wales, and after being in loading berth, as ordered, to load "in the usual and customary manner" a full and complete cargo of Australian coal, "as ordered by the charterers, which they bind themselves to ship (except in case of riot, etc., or any other accidents or causes beyond the control of the charterers, which may delay her loading)." By the custom of the port of Newcastle, a vessel was not allowed to occupy a loading berth until she had received a loading order from a colliery. These orders were issued in turn, and there were no facilities for storing coal at the port. The

[1] (1893, 55 Fed. Rep. 996.)

vessel arrived at her destination on July 14th, 1900, and was ready to load; but there was no cargo ready for her until August 13th, and then not enough. She had twice to be removed from her berth under a regulation of the port that a vessel must not occupy a berth when not loading, and her loading was not completed until August 23. The plaintiffs claimed damages for the detention of the vessel, owing to the delay in providing the cargo. The House of Lords held, reversing the Court of Session, that the defendants were liable in damages on the ground that it was their primary duty as charterers to furnish the stipulated cargo; and there was nothing to be found in the charter-party or the evidence which qualified this absolute obligation.[u]

A ship that has not obtained pratique, and is prohibited by regulations of the port from communicating with the shore is not "ready to load" within the meaning of these words in a charter-party.[v]

Exception to Charterer's duty to provide cargo

See *Fenwick* v. *Schmalz*[w]; *Peterson* v. *Dunn*[x]; *Furness* v. *Forwood*[y]; *Richardson* v. *Samuel*[z]; *Gardiner* v. *Macfarlane*[a]

If there is a provision in the charter-party that the cargo shall come from some particular mine, etc., which is specified, exceptions with reference to bringing down the cargo must be read with reference to that place. But when the place is not specified, the charterer is not, as a general rule, excused unless all practicable modes of loading have been prevented. In *The Rookwood*,[b] the charter-party provided that the ship should proceed to Antwerp, and there load a full and complete cargo, viz., bricks, and cement in casks, which the charterers bound themselves to ship (except in the case of riots, partial or general lock-outs, strikes, or cessation from work on the part of pitmen or other hands engaged in the getting, carriage, or loading of the said cargo from whatever cause, or by reason of accidents in mines or to machinery, or any cause beyond the control of the charterers or

Cargo coming from specified place.

[u] *Ardan S.S. Co.* v. *Weir*, 1905, A.C. 501.
[v] *The Austin Friars, Smith* v. *Dart* 71 L.T. 27. See also *Bailey* v. *De Arrovane* 7 A and E. 919.
[w] L.R. 3 C.P. 312. [x] 1 Com. Cas. 8. [y] 9 Com. Cas. 223.
[z] (1898), 1 Q.B. 261. [a] 20 Sess. Cas. (4 ser.) 414. [b] 1894, 10 T.L.R. 314.

shippers). *The Rookwood* was ready for loading on January 2nd, 1893, of which due notice was given to the charterers. On the preceding December 17th, the charterers' agents wrote to the plaintiffs (the owners of *The Rookwood*), stating that North's Portland Cement Works would load the vessel. The loading did not commence until February 4th, owing to the following reasons:—The shippers who had arranged with the charterers to ship the cargo were North's Portland Cement Works, whose works were situate on the canal uniting Antwerp with Turnhout, the voyage of the canal taking generally forty-eight hours, and the lighters carrying about 300 tons each. Navigation was interrupted by ice on December 24th, and on December 28th the navigation was stopped, the canal being blocked with ice, and in consequence the lighters with the cargo could not be got down to the place where *The Rookwood* was lying. The first lighter was waiting in Antwerp when the ship arrived. The second and third lighters were frozen up in the canal on their way down from North's Works to Antwerp. The ice did not break up until February 2nd, and *The Rookwood* commenced loading on February 4th, and it was completed on February 15th. Twenty working days, as allowed by the charter-party from January 2nd, expired on January 25th, and the plaintiffs claimed twenty-one days' demurrage from January 25th to February 15th. It was admitted that the expense of sending the goods to Antwerp from North's Cement Works by land would have been prohibitive from a commercial standpoint. The frost did not affect the loading berth where the ship was lying, nor the approaches thereto within the docks. Bricks and cement in casks sufficient to load the ship could have been obtained from other sources, notwithstanding that the canal was frozen, so as to have complied with the terms of the charter. But the goods which the shippers had agreed with the charterers to ship were bricks of a particular kind and size, and cement of a particular make and quality. These goods were made at North's Cement Works, and similar goods could not have been procured from elsewhere. The Court

of Appeal held that as a cargo of bricks and cement might have been obtained by the charterers, notwithstanding the frost, and as the charter-party did not specifically refer to bricks, etc., from North's Works, the charterers were not protected by the exceptions, and that the plaintiffs were entitled to the amount claimed.

Coal from particular colliery

But where the ship was to load a cargo of coals "in one or more lots as ordered, at the berth or berths pointed out by charterers' agents," the Court of Session of Scotland held that a strike at the colliery at which the vessel was booked by the charterers was within an exception of "strikes delaying the obtaining, providing, loading, or discharging of cargo," and the charterers excused."[e]

Under a charter-party the steamship *Avis* was bound to proceed to Methil, and there load a full cargo of coals "from such colliery or collieries as charterers may elect, steamer to be loaded in seventy-two running hours, commencing to count when ready to receive cargo, reported at Custom House, berthed, and written notice given to charterers' agents . . . If longer detained, demurrage to be paid" at a certain rate per ton, "unless such delay is caused by general and colliery holidays . . . idle days, strikes, lock-outs, idle time, or restriction of output at the colliery or collieries with which the steamer is booked to load . . . or any other causes beyond the control of the charterers, whether specified therein or not, which may prevent the obtaining or providing of a cargo." The *Avis* arrived at Methil at 6 a.m. on July 28th, and notice was given to the charterers' agent that she was ready to receive cargo. At the time of the arrival of the *Avis* ten vessels were before her, and none of the five-crane berths were vacant. A chance vacancy occurred on July 29th, at a berth at which the *Avis* could not have completed her loading, and another at a suitable berth at 12 noon on July 30th, owing to the cargoes of earlier vessels not being forward. No cargo was ready for the *Avis*, and in consequence she was not berthed. Eventually she was berthed on August 3rd, loaded at 9 p.m. on August 5th, and sailed on August 6th. On

[e] *Lilly* v. *Stevenson*, 22 Sess. Cas. (4 ser.) 278.

July 18th the charterers had ordered a cargo for the *Avis* from the B. Coal Company for delivery on July 28th and 29th, but had been informed by the coal company that they could not book coal for July 28th or 29th. To this the charterers replied that the *Avis* must "take her turn with the rest." July 28th was the last day of the miners' holidays, but very little work was done on July 29th. On the 30th the output was reasonably normal, but the coal company had to supply earlier orders. In an action for demurrage on the assumption that the lay days commenced at 9 a.m. on July 28th, the Court of Session of Scotland, distinguishing the case of *Little* v. *Stevenson*,[d] held (1) that in the circumstances the charterers were bound to have considered the probability of chance vacancies in the loading berths, and to have had a cargo ready for the vacancy which occurred on July 30th; and (2) that the delay in the supply of coals from the colliery did not fall within the exceptions in the charter-party, as the charterers knew when they gave the order to the B. Company that it could not undertake to supply the coal at the time required, and had therefore taken the risk of delay.[e]

When charterer selects place of loading

The Court said[f]:—"In cases where the delay arises from the crowded state of the port, or from any circumstances connected with the particular berth selected by the charterer, it may seem rather hard on the shipowner that the loss of time should fall on him, although he is no way responsible for it. Still the tendency of decision, from *Tapscott* v. *Balfour*[g] downwards, has been to hold that if the selection of the place of loading is left to the charterer, it is the same as if it were named in the charter, and that the lay days cannot be counted till the vessel is an arrived and estimated ship. This rule, however, by no means relieves the charterer, under a contract in terms like the present, from the duty of doing any act that is necessary on his part, according to the custom of the port, to enable the vessel to get a berth. That was fully recognised by the House of Lords in the case of *Little* v. *Stevenson*[h]

[d] 1896, A.C. 108. [e] *Krog* v. *Burns*, 5 Sess. Cas. 5 ser. 1189.
[f] 5 Sess. Cas. 5 ser. p. 1193. [g] L.R. 8 C.P. 46.
[h] 1896, A.C. 108.

And the only qualification of that duty which the House recognised was that the charterer was not bound to have cargo ready in anticipation of a remote and improbable contingency. In this case it seems to me that the charter-party itself provides a sufficient excuse for a portion of the delay which occurred, but not for anything like the whole of it. The day on which the vessel arrived (the 28th) was a 'colliery holiday,' and that is one of the stipulated excuses for delay. On the 29th a very small number of miners were at work, and, although this fact might hardly make it an 'idle day' in the sense of the contract, the quantity of coal raised was so insignificant as fairly, in my opinion, to bring the case within the clause as to 'restriction of output.' But after the 29th the output became reasonably normal, and if the colliery had sent its supply of shipping coal to Methil instead of Burntisland on Wednesday, Thursday, and Friday (in addition to the thirty-five wagons which were already lying on the wharf) it is plain that the loading might easily have been completed within the lay days, counting them as beginning on the 30th."

Causes beyond control.

In *Carlton S.S. Co.* v. *Castle Mail Packets Co.*,[1] a charter-party provided that a ship should proceed to a named dock and "there load in the customary manner (Sundays and holidays excepted), always afloat as and where ordered by the charterers, a cargo of rails." The depth of water in the dock varied with the tides, and was sufficient at spring tides, but not at neap tides, for a ship of the size of the chartered vessel to load there always afloat, and this was within the knowledge of the owners and of the charterers. The ship having arrived in the dock the charterers ordered her to a berth where the loading began and continued for several days; then the water began to fall, and to avoid taking the ground the ship was compelled to leave the dock. After several days she returned with the spring tides and completed her loading. The shipowners having sued the charterers for demurrage or damages, the House of Lords, affirming the Court of Appeal, held that the charterers were not bound to do that which (as was known to the shipowners) might be

[1] (1898), A.C. 486.

physically impossible, namely, order the ship when she arrived at a berth where she could then load continuously always afloat, and that they were not responsible for delay occasioned by natural and physical causes beyond their control.

Lord Trayner, in *Gardiner* v. *Macfarlane*,[j] said:— "The fact that the charterer could not procure the commodity in the market (it not being then for sale) which he had bound himself to put on board the chartered vessel, when that vessel was ready to receive it, is no excuse on the ground of 'hindrances over which he had no control,' for the non-performance of his obligation; any more than would be the excuse that having become bankrupt he had no money to purchase the commodity, it being procurable in the market.[k]

A provision of a charter-party that lay days for unloading shall commence "when steamer is ready to unload and written notice given, whether in berth or not," must be given effect; and delay in waiting for a berth is chargeable against the charterer, although the lay days do not commence merely by notice given of the steamer's arrival in port, but only when she is actually ready to unload, so far as she can be made so by those in charge. A delay in obtaining a berth at a port because of the large number of vessels unloading coal brought from foreign countries, owing to a domestic shortage caused by a strike of miners, was not caused by strikes within an exception in the charter-party. Where a charter-party required the vessel to be discharged at a fixed rate after she was ready to unload, whether in berth or not, a provision that "in case of strikes . . . or any other causes or accidents beyond the control of the consignees, which prevent or delay the discharging, such time is not to count," does not exempt the charterer for delay caused by the vessel waiting her turn.[l]

Dock crowded by foreign vessels, owing to domestic strikes.

When holidays were taken by colliers without leave of their employers, at the colliery from which the ship was to be loaded, the consequent delay was held

Holidays taken by colliers without leave.

[j] 20 Sess. Cas. (4 ser.) p. 427.
[k] See also *Richardsons* v. *Samuel* (1898), 1 Q.B. 261.
[l] *New Ruperra S.S. Co.* v. *2,000 Tons of Coal*, 1903, 124 Fed. Rep. 937.

covered by an exception of "time lost through riots, strikes, lock-outs, or any dispute between masters and men occasioning a stoppage of pitmen . . . or any cause beyond the control of the charterers."[m]

In *Crawford* v. *Wilson*,[n] the defendants chartered the plaintiffs' ship to proceed to R. with a cargo, "and there, in any anchorage ground as ordered by charterers, deliver the same . . . where she can safely lie afloat, as may be directed by the said charterers"; "all unavoidable accidents or hindrances in procuring, loading and discharging the cargo . . . excepted." When the ship arrived at R. a rebellion was in progress, by which the defendants' arrangements for unloading ships were, and continued to be, seriously disorganised. In an action for demurrage, the Court of Appeal held that the rebellion constituted an "unavoidable hindrance in discharging the cargo," and that the defendants were not liable. Lopes L.J. said[o]:—"But the important word with which we have to deal is 'hindrances.' Now with regard to that word, I think that the defendants could not take delivery at the port of discharge in a reasonable and recognised way, contemplated by the parties. If they could only take delivery in an unreasonable way, not recognised or contemplated, they were hindered within the meaning of the clause."

Meaning of hindrances.

Exceptions do not generally apply to Time Demurrage.

When a ship is on demurrage, the time for which demurrage has to be paid generally runs on continuously; the exceptions to the charterer's obligation usually cease to apply. This may, however, depend on the terms of the demurrage clause.[p]

In *Tyne Shipping Co.* v. *Leach*,[q] it was held that where demurrage commences to be payable under a charter-party, owing to the default of the charterers in failing to provide a quay berth at the port of loading, the obligation to pay demurrage continues, in the absence of a default of the shipowner, until the completion of the loading. In that case a ship was chartered to go to a foreign port for a cargo, the

[m] *Allison* v. *Richards*, 1904, 20 T.L.R. 29, 584.
[n] 1896, 1 Com. Cas. 154, 277. [o] 1 Com. Cas. 283.
[p] See *Clink* v. *Hickie* (No. 2), 4 Com. Cas. 292; *Saxon Ship Co.* v. *Union Steamship Co.*, 4 Com. Cas. 298; 5 Com. Cas. 381.
[q] (1900), 2 Q.B. 12.

charterers guaranteeing a cargo and quay berth ready at the port of shipment; owing to their inability to provide quay berth the ship went on demurrage, and while lying at anchor waiting for a quay berth, was run into by another vessel. The ship was properly taken by her captain to another port for repair, and during her absence for that purpose a quay berth fell vacant, which would otherwise have been given to her. After her return to the port of loading she was kept waiting a further six weeks for a quay berth. The shipowners claimed demurrage for the six weeks, but not for the period during which she was absent for repairs. It was held that upon the return of the ship to the port of loading the demurrage period was resumed without any break in the continuity of the demurrage obligation, and that the charterers were liable to pay demurrage from that date until the loading was completed.[r]

Must appliances for loading or discharging be ready?

See the cases of *Wright* v. *New Zealand Shipping Co.*[s] and *Postlethwaite* v. *Freeland*. Lord Selborne, in his judgment in *Postlethwaite* v. *Freeland*,[t] distinguished that case from *Wright* v. *New Zealand Shipping Co.* He said[u]:—"The distinctions between that case and the present (whether the doctrines laid down in it can be supported or not) are, that there no express reference was made in the contract to the custom of the port, and that, if such a reference ought to have been implied, no custom or other circumstances existed, which would have made it impossible for the charterer, by the use of reasonable diligence, to provide himself with lighters for the discharge of the cargo earlier than he did. What the Lords Justices in that case held was that 'an obligation was imposed upon the charterer of providing at the port of discharge sufficient appliances of the kind ordinarily used at the port'; and it was expressly added that he would not have been bound to provide appliances which were not in use there, but which might be in use at other ports."[v] A charter-

[r] See also *Lilly* v. *Stevenson*, 22 Sess. Cas. (4 ser.) 278.

[s] 4 Ex. D. 165. [t] 5 A.C. 599. [u] 5 A.C. 609.

[v] See also *Lyle Shipping Co.* v. *Cardiff Corporation* (1900), 2 Q.B. 683: *Hulthen* v. *Stewart*, 1903, A.C. 389.

party provided that a cargo of Danzig oak logs should be discharged at Millwall Dock "with all dispatch, as fast as steamer can deliver, as customary." The more usual method of that dock is to discharge such a cargo into railway trucks, but it is practicable to discharge into lighters. It was held that it was the duty of the receivers of the cargo, if railway trucks could not be obtained, to discharge into lighters.[w] As to the liability of charterers when the appliances are controlled by the port authority, see *Wyllie* v. *Harrison*.[x]

Control of appliances by Port Authority.

In *Kruuse* v. *Drynan*,[y] a ship with a cargo of pit props, at the port of delivery, was berthed at a quay where, by the rules of the harbour, such a cargo could not be deposited. Delay in taking delivery took place in consequence of a railway company failing to provide a sufficient supply of trucks. The Court of Session of Scotland held that it was no answer for a claim for demurrage that the delay was caused by the fault of the railway company. Lord Justice Clark said:— "The main cause which the defendants put forward was that they were prevented from taking delivery by the want of wagons from the railway company. This may have been the fact, but I take it that that was a matter for them to arrange, and with which the ship had nothing to do. I think the case of *Wyllie* v. *Harrison* has no application here. There is no proof that there is any custom of port in unloading pit props at Bo'ness. The harbour master was asked this question, and he could give no evidence of such a custom." The distinction, therefore, between the decisions in the two cases was that in the one case there was a particular custom at the port of discharge as to the cargo, and in the other case there was not.[z] Under a charter-party a ship was bound to deliver into trucks. The charterers were exempt from liability for detention caused by railways, the railway which carried from the pier having refused trucks because the charterers were already keeping more than the company's regulations

[w] *Rodenacher* v. *May*, 1901, 6 Com. Cas. 37; *Fawcett* v. *Baird*, 16 T.L.R. 198; *Reid* v. *Lee*, 17 T.L.R. 77.
[x] 13 Sess. Cas. (4 ser.) 92. [y] 1891, 18 Sess. Cas. (4 ser.) 1110.
[z] See also *Granite City S.S. Co.* v. *Ireland*, 19 Sess. Cas. (4 ser.) 124; *Letricheux* v. *Dunlop*, ibid. 209; *Mein* v. *Ottmann*, 6 Sess. Cas. (5) 276.

allowed, the ship was detained. The Court of Session of Scotland held that the detention fell within the exception in the charter-party.[a]

By a charter-party a steamer's cargo was "to be discharged as fast as steamer can deliver, after being berthed as customary." The cargo was pig-iron, and the custom of the port of discharge was to deliver by steam cranes into wagons brought alongside, working day and night. It was a rule of the port that no pig-iron should be laid down on the quay. The supply of trucks was restricted to those of two railway companies whose lines had access to the quay. On arrival of the vessel, due notice was given by the consignees to the railway company by whose line the cargo was to be forwarded; but delay was occasioned through failure of the railway company to supply sufficient trucks. The Court of Session of Scotland held that the consignees were not liable in demurrage.[b]

By a charter-party the ship was bound to deliver the cargo, consisting of iron ore, "as customary," at the port of discharge where and as directed by the consignees. The charterers were exempt from liability for demurrage in case of delay, *inter alia*, through "stoppage of trains or any cause beyond the personal control" of the charterers. The time taken for loading and discharging having exceeded the lay days, the shipowners brought an action for demurrage against the charterers, who pleaded the exemption clause. It was proved that the customary mode of discharging iron ore at Ardrossan, the port of discharge when the cargo had been sold (as the cargo in question had been) was direct into railway wagons, although in special circumstances the harbour authorities might give permission for part of a cargo being discharged on the quay. It was also proved that delay in discharging the cargo had been caused by the railway company failing to supply a sufficient number of wagons per day. The charter-party took the ship bound to work at night if requested, but the charterers did not request the harbour authorities for permission to work at night. It

[a] *Letricheux* v. *Dunlop*, 1891, 19 Sess. Cas. 209.
[b] *Wyllie* v. *Harrison* (1885), 13 Sess. Cas. (4 ser.) 92.

was held by the Court of Session of Scotland (1), that the customary mode at Ardrossan of discharging a cargo of iron ore which had been sold was into railway wagons direct; (2), that the charterers were not liable for demurrage in respect of ordinary working hours where the delay was caused by want of railway wagons; but (3), that the absence of wagons during the hours of night did not exempt them from demurrage, as the railway company could not be expected to supply wagons at night without notice.[c]

Notice of arrival at port of loading required, but not at port of discharge.

Where, by the terms of a charter-party, a ship is to proceed to a certain port, and there to load a full cargo for the agents of the freighter, but the freighter has no interest in the cargo, his agents are entitled to notice from the captain that the vessel is ready to receive her homeward cargo; and if no such notice be given, the freighter is not liable for not providing such cargo.[d] Where notice of a specific kind is stipulated for, it is a condition of the charterer's obligation.[e]

But at the port of discharge the master is not bound to notify his arrival to the consignees of goods. In *Harman* v. *Clark*,[f] it was held that where a bill of lading of goods by a general ship deliverable to order contains a stipulation that the goods are to be taken out in a certain number of days after arrival, or to pay demurrage, the indorsee of the bill of lading who takes out the goods is liable for demurrage from the expiration of the lay days calculated from the arrival of the ship, without receiving notice of that event. Where there is such a bill of lading, if there be any inaccuracy in the entry of the ship's name at the custom-house, whereby the owner of the goods, notwithstanding proper inquiries for the purpose, was deprived of the usual means of being informed of the ship's arrival, demurrage cannot be recovered. And in *Harman* v. *Mant*[g] it was held that, although by the bill of lading the goods are deliverable to merchants whose residence is well known, no notice to them of the ship's arrival is necessary to render them liable for demurrage. And

[c] *Turnbull, Scott & Co.* v. *Cruikshank*, 1904, 7 Sess. Cas. 266.
[d] *Fairbridge* v. *Pace*, 1844, 1 C. & K. 317. See also *Stanton* v. *Austin*, 1872, L.R. 7 C.P. 651.
[e] *Gordon* v. *Powis*, 8 T.L.R. 397. [f] 1815, 4 Camp. 159. [g] 1815, 4 Camp. 161.

again, in *Houlder* v. *General Steam Navigation*,[h] it was held that, apart from custom or special contract, the shipowner is not bound to give notice to the consignee of the arrival of the ship; but the consignee is bound, within reasonable time after the arrival, to be ready to remove and receive his goods, and in default of his so doing, the shipowner may land them, and demand wharfage or other proper charges for landing. And the same rule appears to apply in the case of chartered ships.[i]

[h] 1862. 3 F. & F. 170.
[i] Per Brett, L.J., in *Nelson* v. *Dahl*, 12 Ch.D. p. 583.

CHAPTER IV.

Lay Days.

When Lay Days commence.

The merchant usually covenants to load and unload the ship within a limited number of days after she shall be ready to receive the cargo, and after arrival at the destined port, and to pay the freight in the manner appointed.[j] These are called "lay days." But difficulties frequently arise in determining at what point or place the ship can be considered as an "arrived ship," and the determination of this question depends upon the nature of the place to which the ship has to go in order to fulfil her contract. The law on this point was very clearly stated by Lord Esher, in the case of *Nelson* v. *Dahl*,[k] and this statement of the law has been recognised in later decisions. From the propositions laid down by Lord Esher in *Nelson* v. *Dahl*, and from subsequent decisions, it appears that the lay days begin to run (1) where a port is named in the charter-party, when the ship is at the usual place of discharge in that port, or (if there is more than one usual place of discharge) at that place of discharge which the charterers designate;[l] (2) where a dock is named as soon as the ship is in the dock, and it is not necessary in order that she should be an arrived ship that she should be at any

[j] Abbott on Merchant Shipping, 14th Edit., 1901, p. 392. See *Stanton* v. *Austin* (1872), 7 C.P. 651; *Fairbridge* v. *Pace* (1844), 1 C. & K. 568; *Nelson* v. *Dahl* (1877), 12 Ch.D. 568; *Monson* v. *Macfarlane* (1895), 2 Q.B. 563; *Harman* v. *Clarke* (1815), 4 Camp. 159; *Houlder* v. *General Steam Navigation Co.* (1862), 3 F. & F. 170.

[k] 1879, 12 Ch.D. 568.

[l] *The Felix* (1868), 2 A. & E. 273; *Brereton* v. *Chapman* (1831), 7 Bing. 559; *Brown* v. *Johnson* (1842), 10 M. & W. 331; *Kell* v. *Anderson* (1842), *ibid.* 498; *Randall* v. *Lynch* (1810), 2 Camp. 352.

particular place in the dock;[m] (3) where a berth is named which is either expressly designated or is to be named by the charterer, when the ship reaches the named berth;[n] (4) where the ship is prevented from reaching the agreed place of loading or discharging by obstacles caused by the freighter, or other engagements entered into by him, as soon as the ship is ready and waiting to go to the agreed place.[o]

Specified places for loading or discharging.

In order to determine whether the shipowner has contracted to reach a specific place within the port or simply to reach the port itself, it is difficult to lay down a general rule of law which is applicable to all cases, as, apart from the diversity of the language of different charter-parties and bills of lading, the question is frequently one of fact, namely: What is understood in the mercantile world by the place specified?[p] In the case of *Nelson* v. *Dahl*,[q] Lord Esher (then Lord Justice Brett) expressed the following opinion:—"As to loading, the first right of the shipowner is the right of placing his ship at the disposition of the charterer, so as to initiate the liability of the latter, whatever it may be, to take his part as to loading. In every case it seems to me that it is a condition precedent to such right of the shipowner to place his ship at the disposition of the charterer for such purpose that the ship should be at the place named in the charter-party as the place where the carrying voyage is to begin, and that the ship should be ready to load, so far as the ship's part of the operation of loading is concerned. The place so named may give a description of a larger space, in several parts of which a ship may load, as a port or dock; or it may be the description of a limited space in which the ship must be in order to load, as a particular quay, or a particular quay-berth, or a particular part of a port or dock. If, when the charter is made, the ship is already in the place named, the shipowner may place the ship at the disposition of the

[m] *Tapscott* v. *Balfour* (1872), 8 C.P. 46; *Monson* v. *Macfarlane* (1895), 2 Q.B. 563.
[n] *Murphy* v. *Coffin* (1883), 12 Q.B.D. 87; *Tharsis Co.* v. *Morel* (1891), 2 Q.B. 647.
[o] See *Ashcroft* v. *Crown Orchard Colliery Co.* (1874), L.R. 9 Q.B. 540; *Tillett* v. *Cwm Avon Works Proprietors* (1886), 2 T.L.R. 675.
[p] Abbott's Merchant Shipping, p. 393.
[q] (1879), 12 Ch.D. 568, 581.

charterer as soon as the ship is ready, so far as she is concerned, to load, by giving notice thereof to the charterer. If the place named be of the larger description, as a port or dock, the notice may be given, though the ship is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but if the place named is of a more limited description, the notice cannot be given until the ship is at the named place, though the ship is in the port or dock in which the named place is situated. If the ship is not, when the charter is made, at the port or place where she is to load, the form of the charter-party is, 'That the said ship, being at' (the place where she then is), 'shall proceed, etc., to' (the place named as the beginning of the carrying voyage), 'or as near thereunto as she can safely get, and shall there load, etc., and proceed thence, etc.' In this case, also, the named place whence the carrying voyage is to begin, though the carrying voyage is not the whole chartered voyage, may, as before, describe a larger or more limited space. If it describes a larger place, as a port or dock, the shipowner may place his ship at the disposition of the charterer when the ship arrives at that named place, and, so far as she is concerned, is ready to load, though she is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but, in the absence of his right to place his ship only as near to the named place as she can safely get, he cannot place his ship at the disposition of the charterer so as to initiate the liability of the latter as to the loading until the ship is at the named place, or the place which by custom is considered to be intended by name; as, if a larger port be named, the usual place in it at which loading ships lie. If it describes a more limited place, as a quay or quay berth, or a particular part of a port or dock, the shipowner may place his ship at the disposition of the charterer when the ship is arrived at that place, ready, so far as she is concerned, to load, but not until the ship is at that place." Having brought the ship to her place of discharge, his lordship continued[r]:—"If the named place describes, as before, a large space, in several parts of which a ship can unload,

Lay Days—Place at which time begins to run.

[r] 12 Ch.D. 583.

as a port or dock, the shipowner's right to have the charterer's liability initiate commences as soon as the ship is arrived at the named place, or the place which by custom is considered to be intended by the name, and is ready, so far as the ship is concerned, to discharge, though she is not in the particular part of the port or dock in which the particular cargo is to be discharged. But, in the absence of his right to place the ship only as near to the named place as she can safely get, the shipowner's right to have the charterer's liability to unload initiate, does not commence until the ship is in the named place. The liability of the shipowner as to the commencement of the unloading is to use all reasonable dispatch to bring the ship to the named place where the carrying voyage is to end, unless prevented by excepted perils, and when the ship is there arrived, to have her ready with all reasonable dispatch to discharge in the usual or stipulated manner. If the named place describes a more limited space, as a quay, then the right of the shipowner to have the liability of the charterer initiate does not commence until the ship is at the named place, although the ship is in the port, or dock, or larger space in which the named place is situated. . . . These statements of the law seem to me to be also consistent with and to be the result of all the cases."

Lord Esher limits his statement as to arrival at a place of larger description to "the place which by custom is considered to be intended by the name, as, if a larger port be named, the usual place in it at which loading ships lie." Examples of this may be found in the following cases:—In *Brown* v. *Johnson*[s] a ship arrived at Hull, the port of her destination, on the 1st February, and was reported. On the 2nd she entered the dock, and was given in charge of the dock officer, but did not get to the place of unloading till the 4th, in consequence of the full state of the docks, the officer refusing to take her out of her turn; and the discharge was not completed till the 22nd. It was held that the lay days were to be calculated from the period of her arrival in dock, and not at the place of unloading.

[s] 1842, 10 M. & W. 331.

Lord Abinger, C.B., said:—"My opinion is that lay days under this charter-party commenced from the time of the vessel's coming into dock; it had then arrived at its usual place of discharge. They certainly did not commence at the period of its entering the port, as that might be very extensive; for instance, Gravesend is part of the Port of London."

In *Kell* v. *Anderson*[t] a charter-party provided that a vessel was to take in a cargo of coal at Newcastle, and proceed therewith to London, or as near thereto as she could safely get, and deliver the same to the freighters, etc. The vessel arrived in the Port of London, off Gravesend, on the 9th March, and on the 18th the cargo was sold, and the vessel entered by the freighters for a meter. On the 20th she received an order from the harbour-master to proceed to the Pool. On Monday, the 22nd, she commenced working out her cargo, and was cleared on the 27th. It appeared that, in consequence of the factor's certificate that she was a metered vessel, the harbour-master had detained her at Gravesend till the 20th, when her turn arrived for her to proceed to the Pool and discharge her cargo; that, if she had not been on the meter's list, this regulation would not have applied, and she might have proceeded to the Pool at once. It was held that, under these circumstances, the vessel was not to be considered as having arrived at her place of discharge until the 20th, and that therefore the lay days did not begin to count till then. And in *Neilson* v. *Wait*,[u] Lord Esher said. "Her owners are bound and entitled to deliver at the port only in one part of the port, namely, at the usual place of delivery at that port of a cargo such as that which she carries."

Arrival at the Port sufficient.

An example of arrival at a port, as distinguished from arrival at a particular loading or discharging place in that port being sufficient, is to be found in *Pyman* v. *Dreyfus*.[v] In that case a charter-party provided that the ship should proceed to Odessa, or as near thereto as she could safely get, and there load. Twelve running days (Sundays excepted) were allowed for loading and unloading, and ten days on demurrage.

[t] 1842, 10 M. & W. 498. [u] 1885, 16 Q.B.D. 67, 69.
[v] (1889), 24 Q.B.D. 152.

The ship arrived in Odessa outer harbour on the 22nd December, but was not allowed to go alongside a loading quay berth, as the docks were crowded. It was possible to load vessels at Odessa at a loading quay berth either in the inner or outer harbour. There was not at that time a custom at the port of Odessa that steamships under charter were only considered ready to receive cargoes when moored alongside the quays. On the 8th January she was ordered to a berth in the inner harbour, and proceeded to take in cargo. It was held that the lay days began to run on December 22nd and expired on January 5th, as the voyage was completed as soon as the ship had arrived in the outer harbour at Odessa, and as near as she could get to a loading quay berth. Mr. Justice Mathew said:—"I think that in the particular class of cases of which the present is an example, it may be stated to be the rule that where the port of loading or discharge named in the contract contains several places of loading or discharge,[w] and the contract also names a time in which the vessel is to be loaded or discharged, the option of the merchant in the selection of the place of loading or discharge is to be exercised subject to the obligation into which he has entered that the cargo shall be loaded or discharged within the time named.[x]

Then the vessel arrived on December 22nd at a point where she was at the disposition of the charterers. They had only to indicate the place to which she was to go for her cargo, and she would have been there immediately. The place of loading chosen by the charterers was a place where she could not load, as it was a part of the port then crowded by other ships, and she had to wait a considerable time. It appears to me that during all this time the charterers were contracting a liability under their contract that the ship should be loaded during the time specified in the charter-party."

[w] That is, where such places are not specified. If they are, the ship must reach them: *Murphy* v. *Coffin* (1883), 12 Q.B.D. 87; *Tharsis Sulphur Co.* v. *Morel* (1891), 2 Q.B. 47, over-ruling *The Carisbrook*, 15 P.D. 98, and *Dall' Orso* v. *Mason* (1876), 8 Sess. Cas. (4) 419.

[x] See also per Lord Blackburn in *Dahl* v *Nelson*, 6 A.C. 38, who said, at p. 44: "If the charter-party had left it free to the merchant to select a dock, it may be well that he was bound to select one into which admittance could be procured. *Ogden* v. *Graham* is an authority in favour of that position."

The distinction between *Pyman* v. *Dreyfus* and *Brown* v. *Johnson* is that in the former the outer harbour at Odessa was a place where loading was practicable, while in the latter there was no evidence of the ship reaching a usual discharging place till she got into dock. Both cases agree in charging the merchant from the time the vessel reached these places, although in each of them it took her some days to reach her loading or discharging berth. *Kell* v. *Anderson* is also distinguishable from *Pyman* v. *Dreyfus*, as in the former the ship had not reached the place which by custom was considered to be intended by "London," while in the latter case it was found that there was no custom.[y]

By a charter-party a ship was to proceed "to Plymouth, not higher than S. or N., or as near thereunto as she can safely get and deliver" her cargo, with certain lay days and demurrage days. The port of Plymouth is a tidal estuary. On the ship's arrival in Plymouth, the consignee ordered her to discharge at B., an ordinary landing place in the port of Plymouth, lower down than S. or N. At this time the tides were neap; the vessel went as near B. as she could in that state of the tide, and lay on the sand for some days, till the tides being higher she got to B. It was held that the consignee had the option of naming any ordinary loading place in the port of Plymouth, within the limits assigned, and that the lay days did not commence till the vessel reached the place so named, the delay in getting to it being occasioned only in the ordinary course of navigation in a tidal river.[z]

In *Tharsis Co.* v. *Morel*[a] a vessel was to proceed to the Mersey and deliver her cargo at any safe berth as ordered on arrival at Garston. On arrival a berth was ordered, but owing to the crowded state of the dock delay occurred, which prevented the vessel being berthed for some time after arrival. On a claim by the shipowners for demurrage arising from the delay, the Court of Appeal held that the obligation of the charterers to unload did not commence till the vessel was berthed. Lord Esher said[b]:—"But *Tapscott* v.

[y] Abbott's Merchant Shipping, p. 396.
[z] *Parker* v. *Winlo*, 7 El. & Bl. 942. [a] 1891, 2 Q.B. 647.
[b] 1891, 2 Q.B. p. 650.

Balfour[c] has dealt with the charter-party in a similar form, where a particular dock has to be named, the necessary result of the agreement being that when the charterer exercises that power the result is the same as if the dock had been named in the charter-party. . . . I think the decision was quite right, and that when the charterer has to name a dock or a place in a dock, when he does so, it is as though it had been named in the charter-party and indicates the termination of the voyage. To hold otherwise would be to give no effect to the words 'as ordered.' It seems to me that *Murphy* v. *Coffin*[d] follows and adopts the ruling in the previous case. I do not desire in this case to decide whether *Davies* v. *McVeagh*[e] was rightly or wrongly decided. It is open to an interpretation which would make the decision wrong, and opposed to *Nelson* v. *Dahl*,[f] but if that is the correct interpretation it would follow that I must have decided the point of law in a different way in two cases that were decided about the same time.[g] I cannot help thinking that the explanation of that decision is that which I pointed out in *Nelson* v. *Dahl*." In *Nelson* v. *Dahl*[h] Lord Esher said:—"In *Strahan* v. *Gabriel*,[i] tried at Newcastle, the named place was a quay. The ship arrived and found the only quay berth occupied by another ship. The shipowner offered to discharge across the ship which occupied the quay berth, if the charterer would pay for the stage and labour. The charterer refused. The shipowner claimed demurrage. I held that lay days did not commence to run until the plaintiff's ship was alongside the quay, the quay being the place named whereat the voyage was to end. In *Davies* v. *McVeagh*, tried at Liverpool, the place named was the Wellington Dock. The ship was on a certain day admitted into the Wellington half-tide basin, but was refused admission for a considerable time into the Wellington Dock because the loading berths therein were full. The evidence given, and I have referred to my notes for the purpose, was in

[c] 8 C.P. 46. [d] 12 Q.B.D. 87. [e] 4 Ex.D. 265.
[f] 12 Ch.D. 568.
[g] See *Strahan* v. *Gabriel*, referred to in *Nelson* v. *Dahl*, 12 Ch.D. 589.
[h] 12 Ch.D. p. 590.
[i] 26th June, 1879; not reported. [j] 4 Ex.D. 265.

terms that there were gates to the half-tide basin from the river and that at Liverpool the half-tide basin was always treated as part of the Wellington and Bramley Moore Docks. It was not argued that it was not, but only that the liability of the charterer did not initiate until the ship was at the high level in Wellington Dock, which was the place of loading. I held that the lay days began to run when the ship was admitted into the dock—*i.e.*, the half-tide basin. I held that it was the dock in consequence of the evidence. The dispute was only whether the liability commenced when the ship was in the dock, or when she was at a loading berth. . . . Upon this review, then, of cases it seems to me that since *Randall* v. *Lynch*[k] all the cases recognise the doctrine that where lay days are allowed they begin to run when the ship is in the places named in the charter-party as that where the carrying voyage is to begin, or where that voyage is to end, and that they do not begin until then"; and that if the place named for the carrying voyage to begin is a wide space, "as a port or dock, the shipowner may place his ship at the disposition of the charterer, when the ship arrives at that named place, and so far as she is concerned is ready to load, though she is not then in the particular part of the port or dock in which the particular cargo is to be loaded."[l]

Time to count when ship "ready to discharge."

By a charter-party a steamer when loaded with coal was to proceed to a certain port, "and as usual and customary deliver the same, always afloat, to the order" of the charterers "alongside any store, craft, steamer, depôt, ship, wharf, or arsenal. . . . Time for delivery to count when steamer is ready to discharge." There was only one customary place of discharge at the port in question, and when the steamer arrived at the port that place was occupied. In an action for demurrage it was held that the steamer was not "ready to discharge," and that the time for delivery did not, therefore, commence until she was at the customary place of discharge in the port.[m]

[k] 2 Camp. 352. [l] 12 Ch.D. p. 582.

[m] *Sandars* v. *Jenkins* (1897), 1 Q.B. 93.

A charter-party provided that the vessed should proceed to Malta for orders; which were to be given from London within twenty-four hours after receipt of notice, or lay days to count. It was held that orders not having been given within the prescribed time the lay days did not begin to count till the expiration of the twenty-four hours.[n]

By a charter-party a ship was to proceed to B., or so near thereto as she could safely get, and there load as customary, always afloat, at such wharf, jetty, or anchorage as the charterer's agent might direct, a certain cargo. Owing to her draught the ship could not have loaded fully at the berth at the jetty, but, according to the custom of the port, she would be moved when partly loaded from the jetty to an anchorage to complete loading. It was held by Kennedy J. that the lay days did not begin to run until the ship was at the jetty or anchorage the charterer's agent directed, and that the fact that she could not fully load there made no difference and did not prevent the charterers requiring her to come to the jetty and claiming that the lay days did not commence until she was at the jetty. "If a ship is prevented from going to the loading place, which the charterer has a right to name, by obstacles caused by the charterer or in consequence of the engagements of the charterer, the lay days commence to count as soon as the ship is ready to load and would, but for such obstacles or engagements, begin to load at such place."[o]

Obstacles caused by Charterer.

In *Ogmore S.S. Co.* v. *Borner and Co.*[p] a charter-party provided that the plaintiffs' ship should proceed to Maryport (Senhouse Dock) and there deliver her cargo, as customary, where and as directed by consignees. At the date of the vessel's arrival at Maryport the purchasers of her cargo had already several vessels discharging in the dock, and, by reason thereof, under the dock regulations, the plaintiffs' vessel was

[n] *Bryden* v. *Niebluhr* (1884), 1 Cab. & E. 241. See *Gullischen* v. *Stewart* (1884), 13 Q.B.D. 367.

[o] *Aktieselkabet Inglewood* v. *Miller's, &c., Forests*, 1903, 88 L.T. 559, 560. See also *Watson* v. *Borner & Co.*, 5 Com. Cas. 377; *Harrowing* v. *Dupré*, 7 Com. Cas. 157.

[p] 6 Com. Cas. 110

not permitted to enter the dock for some time. It was held that the charterers were not responsible for the delay so caused.

In *Harrowing* v. *Dupré* [q] the defendants, under a charter-party, in fulfilment of a contract for the sale of Spanish ore, shipped a cargo of ore on board a steamship, to be delivered at Maryport, as customary, where and as directed by consignee. At Maryport, by the harbour regulations, consignees having one vessel already discharging for them cannot have another vessel berthed to discharge for them if a vessel of any other consignee is awaiting a berth. The defendants, on the arrival of the ship, had four other vessels chartered by them, with cargoes of ore for the same purchasers, who were treated by the harbour authorities as the consignees awaiting a berth, and many vessels for other consignees were also waiting. The ship was consequently unable to get a berth for twenty days after arrival. It was held that the delay was not the fault of the charterers, and that where, under such a charter-party, the delay complained of is such as ought to have been in the contemplation of both parties at the time of the contract, the shipowner has no cause of action against the charterer.[r]

Shipowner has no action where delay contemplated.

By a charter-party it was provided that a ship should proceed to Santander, excluding San Salvador old tip, "to a loading place as ordered," and there take on board a cargo. It was held by Kennedy J. that the ship could not be taken as an arrived ship for the purpose of the commencement of the lay days until she had arrived at the loading place as ordered, and that arrival at Santander was not sufficient. A shipowner who has a lien on the cargo for freight or demurrage, when he has the opportunity of unloading the cargo, cannot keep the cargo on the ship and then claim for the detention of the ship.[s]

But in *Monson* v. *Macfarlane* [t] the Court of Appeal decided against the charterer.[u] The Circuit Court of

[q] 1902, 7 Com. Cas. 157.

[r] See also *Ashcroft* v. *Crown Orchard Colliery Co.*, 43 L.J. Q.B. 194; *Tharsis Co.* v. *Morel* (1891), 2 Q.B. 647.

[s] *Modesto Peneiro & Co.* v. *Dupré*, 1902, 86 L.T. 560.

[t] 1895, 2 Q.B. 562.

[u] See also *Macbeth* v. *Wild*, 1900, 16 T.L.R. 497

Appeal of the United States also decided against the charterer in *Carbon Slate Co.* v. *Ennis*[v]

Ready to receive cargo.

In an action for damages for loss of freight and for demurrage, it was proved that the defendants, who carried on business at O., made a contract with the agent of the plaintiff in L., in the form of a letter signed by the defendants, and containing these clauses:—"Steamer to load end of November or early Decmber. Charterers having the option of cancelling if she is not ready to receive cargo by the 12th December next. Steamer to be loaded on usual berth terms, 2 per cent. commission to us." The defendants had made contracts with merchants at O. for loading the vessel, the merchants having the power of cancelling if the vessel was not ready to load on the 12th December, and the vessel was not to be considered ready to load until moored alongside the quay. The plaintiff had no notice of these contracts. The vessel arrived at O. on the 10th December, and her stern having been fastened to the breakwater, the captain gave the defendants notice that he was ready to receive cargo, but the merchants refused to take the notice that the vessel was "ready to receive cargo" until she was moored alongside the quay, which could not be done before December 18th. Meantime the merchants cancelled their contracts with the defendants, and the vessel was loaded at a lower rate of freight than that specified in the contract. It was held (1) that the defendants were liable as principals, as they had contracted in their own names without any qualification, and (2) that the plaintiff was entitled to recover damages for the loss of freight, as the vessel was "ready to receive cargo" within the meaning of the contract, although not moored alongside the quay, and that the matter was not affected by an alleged custom at the port of O. that a vessel was not to be considered "ready to receive cargo" until moored alongside the quay; but (3) that the plaintiff was not entitled to damages for demurrage or detention of the vessel after the 12th December, as the contract came to an end on that date.[w]

[v] 114 Fed. Rep. 260.
[w] *Hick* v. *Tweedy*, 6 Asp. M.C. 599.

Purchasers of cargo having control of wharf.

In *Watson* v. *Borner*,[z] the plaintiffs' steamship was chartered to the defendants, who sold a cargo "ex-ship R. Dock." The purchasers of the cargo were lessees of a wharf in the R. Dock, and had sole control over the wharf and the berthing of vessels there. The charter-party provided that the vessel should proceed to the purchasers' wharf, and there deliver her cargo. "Time for discharge to count from 6 a.m. after ship is in every respect ready in berth." The vessel arrived in the R. Dock on February 8th, and was then ready to discharge. Other vessels, which arrived at the dock after the plaintiffs' vessel, were given preference to suit the business arrangements of the purchasers, who did not give the plaintiffs' vessel a berth until February 14th. By a contract between the charterers and the purchasers the cargo was to be discharged at the rate of 300 tons per working day from the time when the ship was ready to discharge, otherwise the purchasers were to pay demurrage as per charter-party. The Court of Appeal held that the lay days did not begin to run until 6 a.m. on February 15th, and that the charterers were not responsible for the delay in getting into berth, though they did not insist on their rights under their contract with the purchasers.

All the discharging berths being occupied.

By the terms of a charter-party the ship was to load from the charterers' agents at Cardiff a cargo of coals, "and therewith proceed to Dieppe and deliver the same alongside consignee's or railway wharf, or into lighters, or any vessel or wharf where she may safely deliver, as ordered, cargo to be loaded and discharged in forty-eight running hours, etc. Demurrage over and above the said lying time at 10s. per hour." The ship arrived in the dock at Dieppe, and was ordered to discharge at the railway wharf, but in consequence of all the discharging berths being occupied, she was not berthed at the railway wharf until twenty-four hours after her arrival in the dock. In an action by shipowner against charterers for demurrage, it was held that the voyage was not completed, and the lying time did not commence under the charter-party until the

[z] 5 Com. Cas. 377.

ship was berthed at the railway wharf, and therefore that the defendants were not liable to pay demurrage for delay in respect of the period which elapsed between the ship's arrival in the dock at Dieppe and her being berthed at the railway wharf.[y]

A ship is to be taken to have arrived at the place named in the charter-party when she has arrived at the place where, according to the custom of that port, she is considered and treated as an arrived ship; and from the date of her so arriving the days for unloading and demurrage commence, whatever may be the condition of the dock or the regulations imposed by the dock authorities. Hence evidence is admissible to show that the custom of the port is as to when a vessel is considered to be arrived. In an action for demurrage, the question was sought to be asked: "Is there any custom here (*i.e.*, at Liverpool) as to vessels arriving with timber as to when they arrive at their usual place of discharge?" The judge refused to allow the question to be asked. But it was held that the question ought to have been allowed.[z]

When ship is considered to have arrived.

In *La Cour* v. *Donaldson*,[a] it was agreed by a charter-party that a steam vessel, after being laden with railway sleepers, should proceed to a certain port, "or so near thereunto as she may safely get, cargo to be brought to and taken from alongside at merchant's risk and expense." The port specified consisted merely of a roadstead in a tidal river, and of a quay along the river side. The vessel on arrival at the port could not get a berth at the quay as they were all occupied, and could not have been brought alongside the quay for want of water. She was, accordingly, moored to the quay at a distance of about sixty yards, another vessel lying between her and the quay. A cargo of sleepers, so far as the custom of the port went, was generally discharged at the quay side, but when necessary upon rafts. The charterers refused to take delivery on rafts except of the deck cargo, with a view merely of lightening the vessel, and insisted on the vessel being brought to the quay side. The Court

Berths full, vessel moored to another vessel.

[y] *Murphy* v. *Coffin*, 12 Q.B.D. 87.
[z] *S.S. "Nordin"* v. *Dempsey*, 1876, 24 W.R. 984.
[a] 1874, 1 Sess. Cas. (4 ser.) 912.

of Session held (1) that the vessel, being moored as near the quay as was possible under the circumstances, had reached her place of discharge; and (2) that as the charter-party contained a stipulation that the steamer should be discharged as fast as possible, the merchant, on being called on to take delivery of the sleepers on rafts, a recognised mode of delivery, was liable in demurrage for the delay caused by his refusal. Per Lord President:—"If the merchant had not been expressly called on to take delivery on rafts he would not have been bound to offer to do so."

In *Bremner* v. *Burrell*,[b] the schooner *St. F.* was chartered at S. to load a cargo of scrap iron, and "therewith proceed to Grangemouth, or so near thereunto as she may safely get." The cargo was to be brought to and taken from alongside the ship at the merchant's risk and expense. The vessel arrived in the roads at the mouth of the River Carron, on which the port of Grangemouth was situated, on the 10th September, but the docks were full, and she could not get a berth. On the 12th, being unable to get into dock, the master brought the vessel into the river, and moored her off the entrance to one of the docks. On the 13th the master intimated to the charterers that he was ready to discharge. It was proved that vessels frequently discharged cargoes of a similar character to that of the *St. F.* by means of lighters, while lying in the river in the same position, but there was no practice as to cargoes of scrap iron, the trade in which was of very recent introduction at Grangemouth. The Court of Session held that on the 13th September the *St. F.* had reached her destination, and that the charterers were bound to commence the discharge on the following day.

Vessel moored off entrance to Dock.

It seems impossible to reconcile all the numerous decisions on the question when lay days begin to run, but Mr. Carver, in his work on Carriage by Sea, p. 760, sec. 627, thus summarises the cases:—

(1) When a particular wharf is named as the place of loading or discharging the lay days will not begin to run until the ship is ready alongside that wharf.

[b] 1877, 4 Sess. Cas. (4 ser.) 934.

(2) When a particular dock is named the lay days will begin as soon as the ship is ready, and at the freighter's disposal, inside the dock, though not alongside the quay; even though the work can only take place at the quay.

(3) When the place named is a port, or other wide district, the lay days begin when the ship is ready and at the freighter's disposal, within the named place; though she may not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go.

(4) If, however, in case (3) the contract expressly entitles the charterer to order the ship to a particular wharf or dock, the wharf or dock so ordered becomes the place of loading or discharge, as though it had been originally named in the contract.

(5) If in any case the ship is prevented from going to the wharf, dock, or other agreed place for loading or discharging, by obstacles caused by the freighter, or in consequence of other engagements which he may have entered into, then the lay days will begin as soon as the ship is ready and could, but for such obstacles, go to that place to load or discharge.

(6) But in each case, so far as relates to loading, the lay days do not begin until the charterer has had notice of the ship's readiness to load.

Where ship has to lighten before reaching usual place of discharge.

At certain ports vessels are obliged to lighten before they can reach the usual place of discharge, owing to the shallowness of the water, having regard to the draught of ships commonly employed in the trades with which such ports are connected, for if a ship has contracted to proceed with her cargo to a "safe port, or so near thereunto as she can safely get, and always lie and discharge afloat," and she is ordered to go to a port to which it is unusual and unreasonable that so large a ship should be sent, she may refuse on the ground that it is not a safe port.

A vessel was chartered to proceed with a cargo of grain from Baltimore to Falmouth for orders "thereon to a safe port in the United Kingdom as ordered." The vessel was ordered to Lowestoft. Her draught

of water when loaded was such that she could not be afloat in Lowestoft Harbour without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in Lowestoft Roads. The consignee offered at his own expense to lighten the vessel in the roads, but the master refused to proceed to Lowestoft to discharge, and went to Harwich as the nearest safe port, and there discharged the cargo. The Court of Appeal held that the consignee could not recover damages against the shipowner for the refusal of the master to discharge at Lowestoft. It was held also that evidence that it was the custom of the port of Lowestoft for vessels to be lightened in the roads before proceeding into the harbour was not admissible.[c] In *Shield* v. *Wilkins*[d] it was held that a stipulation that a ship shall proceed to a certain place, or as near thereto as she can safely get, and there load a full cargo, means such a place to which she can safely get, and from which, when loaded, she can safely get away.

If the port is one at which it is usual for such ships to discharge, and if it be customary for them to unload a portion of the cargo, at the consignee's risk and expense, when they are as near the usual discharging place in the port as they can safely get, the ship, if by so discharging a reasonable portion of the cargo, can get to the usual place of discharge, must lighten in accordance with the custom of the port, and then proceed with the remainder of her cargo to her final place of unloading within the port.

Vessel must lighten in accordance with custom of port.

In *Hillstrom* v. *Gibson*[e] a vessel was chartered abroad to take cargo to "a safe port" in the United Kingdom, "or so near thereto as she can safely get, and lay afloat at all times of the tide, and deliver the same, and so end the voyage." After the words "deliver the same," the words "according to the custom of the port," standing in the printed form of the charter-party, were deleted before signature. The master was directed to take the vessel to Glasgow, but on her arrival at the Tail of the Bank, an open roadstead near Greenock, twenty-two miles from Glasgow

[c] *The Alkambra*, 1881, 6 P.P. 68. [d] 5 Ex. 304.
[e] 1870, 8 Sess. Cas. (3 ser.) 463.

harbour, it was found that unless she was lightened she could not lie afloat in Glasgow harbour at low tide. In these circumstances the shippers, according to custom, lightened the vessel by taking delivery of a part of the cargo, and then required the master to deliver the remainder at Glasgow, which he did under protest, and then raised an action for demurrage. The Court of Session of Scotland held that demurrage was not due, Glasgow being the port of discharge, and the ship having been lightened merely to enable her to complete her contract by delivery of the cargo there. It was observed that although the master was not bound under the charter-party by the custom of the port in discharging the cargo, it was nevertheless a material circumstance as demonstrating the reasonableness of lightening the ship at the Tail of the Bank.[1]

Lay days begin to run from arrival.

The computation of the time during which lay days are to run begins, in the absence of anything to the contrary in the contract, with the arrival of the ship at the usual or designated place of discharge in the port of destination. Where the place of the removal of the cargo is "within the ambit of the port," and that removal is so common as to be the foundation of a binding usage to put out at that place, and there deliver into the custody of the merchant so considerable a quantity of the cargo of a particular ship as upwards of two-thirds of the whole, a jury may, notwithstanding an attempt by merchants to establish an inconsistent usage as to lay days, hold that the operation is in substance a part discharge, and that the place where that operation is usual is a usual place for the commencement of the discharge. Whether a partial putting out of the cargo is a part discharge or a mere lightening, is to be determined in each case by the jury, having regard to the terms of the contract and the usage of the port. As soon as the period arrives at which the owner of the cargo is bound to accept part delivery, the voyage is at an end, and so, where, by the usage of a port, a cargo is to be discharged within the port in two separate parcels at two different

Partial putting out of cargo.

[1] See *Capper* v. *Wallace*, 1880, 5 Q.B.D. 163; *Hayton* v. *Irwin*, 1879, 5 C.P.D. 130; *Reynolds* v. *Tomlinson* (1896), 1 Q.B. 586; *Herring* v. *Ward*, 8 L.J. Q.B. 218.

places, both places taken together constitute the usual place of discharge, and the lay days commence to run from arrival at the first.[g] And if the discharge is to take place in a fixed period, the time, having begun to run at that point, runs on continuously, without excluding the time occupied in moving from one part of the port to another.[h]

A charter-party provided for payment of demurrage by the charterer for every day's detention of the vessel by his default, and that she should be ordered to where she could discharge "always afloat"; by the bill of lading she was ordered to the "Port of Newry," but from the weight of the cargo, the depth of water, and the draught of the vessel, it was necessary to discharge part of her cargo at "The Pool," in Carlingford Roads, about ten miles from Newry. The Irish Exchequer Chamber held that "The Pool" being within the "Port of Newry" for Custom-house purposes, and taking the "Port of Newry" in its legal sense and not as a geographical expression, the lay days began to run from the date of the commencement of the discharge at "The Pool."[i]

Custom of the port not to count time of partial discharge.

If there is an established custom at the port not to count the time so occupied, that may alter the matter. In *Nielson* v. *Wait*,[j] it was agreed by charter-party that the plaintiffs' steamship should proceed to Cronstadt and load a cargo of wheat, and therewith proceed to a port in the English or Bristol Channel as ordered, "or so near thereto as she may safely get at all times of tide and always afloat, and deliver the same. Eight running days (Sundays excepted) to be allowed the merchants, if the ship be not sooner dispatched for loading and discharging the steamer, and ten days on demurrage, if required over and above the laying days, at £25 per day." The steamer arrived at Cronstadt, occupied six running days in loading a cargo of 4,325 quarters of wheat, and was ordered to Gloucester, Bristol Channel, for discharge. She arrived at Sharpness Dock in the Bristol Channel on the 13th

[g] *M'Intosh* v. *Sinclair*, 1877, Ir.R. 11 C.L. 456.
[h] *Ibid.*, and see per Lord Esher *Nielsen* v. *Wait*, 16 Q.B.D. p. 75, and per Pollock, B., *ibid.*, 14 Q.B.D. 523.
[i] *Caffarini* v. *Walker*, 1876, Ir.R. 10 C.L. 250.
[j] 1885, 16 Q.B.D. 67.

November. Sharpness Dock is within the port of Gloucester, and about seventeen miles from the basin within the city of Gloucester, where grain cargoes are usually discharged if the burden of the ship will admit. The steamer was ready to commence the discharge of her cargo on the 13th, but could not get nearer to Gloucester than Sharpness until part of her cargo was first discharged at Sharpness. On the 14th and 15th of November the consignees discharged into lighters 1,585 quarters of the cargo, and then required the master to take the steamer through the canal to a place of discharge within the basin at Gloucester. The master proceeded, and arrived in the basin on the 17th. On the 18th the residue of the cargo was discharged, and the vessel returned to Sharpness, where she arrived on the 19th. In an action for demurrage, evidence was given of a custom of the port of Gloucester, according to which the usual place of discharging grain cargoes was at the basin within the city, and when vessels with grain cargoes destined for Gloucester were of too heavy a burden to come up the canal, they were lightened at Sharpness of so much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester basin, the lay days counted, but the time occupied by coming up the canal to discharge at Gloucester basin and by returning to Sharpness was not counted. The Court of Appeal held (1) that the custom was reasonable; (2) that it was not inconsistent with the express provision in the charter-party as to "running days," and that the time occupied by the vessel in going from Sharpness to the basin, and in returning to Sharpness ought to be excluded from the lay days, and the plaintiffs were entitled to one day's demurrage only.

In *Dickinson* v. *Martini*,[k] a ship was chartered to "proceed to a safe port in the United Kingdom, or so near thereunto as she may safely get always afloat at any time of the tide." She was ordered to Glasgow, but owing to her draught of water, had to discharge part of the cargo off Greenock before proceeding to Glasgow. In an action for demurrage, the Court of

[k] 1874, 1 Sess. Cas. (4 ser.) 1185.

Session held that the voyage was completed at Greenock, so far as regarded the cargo discharged there, and that the time spent in lightening at Greenock was to be included in the lay days.

Construction of Demurrage Clauses.

Under a charter-party to load coals and iron at Cardiff, and proceed with them to Alexandria, the running days to commence on the 16th December, 1834, plaintiff having, with defendant's consent, laden the coals at Pembroke in ten days ensuing the 16th December, and not having sailed for Cardiff till the 27th, it was held that the running days were still to be reckoned from the 16th December, wherever the ship might be stationed.[1]

An agreement for the carriage of certain engines, provided that the ship should not be required to lie in her berth more than ten days, and that such of the engines as weighed above 20 cwt. should be put in the steamer, stowed, taken out, and landed at the shipper's risk and expense. At the time of the agreement it was expected that alterations in the hatchways would be necessary in order that the engines might be stowed. Owing to such alterations, which were needful in shipping some of the engines which weighed over 20 cwt., the ship was delayed beyond the ten days. The shipper was held liable for the delay.[m]

By a charter-party it was agreed that a ship should proceed to Pernambuco and there load from the factors of the freighter, having first discharged her cargo, if any, a full cargo, and proceed therewith to Valparaiso (a legal port between Valparaiso and Guayaquil) and Guayaquil, all or any, and there discharge the cargo and goods taken on board at Valparaiso, and at any and all the aforesaid ports should take on board a full cargo, and therewith proceed to England for orders to discharge. Seventy running days were to be allowed the merchant, if the ship was not sooner dispatched, for loading, discharging, and reloading the ship at the several ports, to be computed from the several periods of the vessel being clear and ready. She took in a cargo at Pernambuco, and dis-

[1] *Jackson* v. *Galloway*, 1838, 5 Bing. N.C. 71.
[m] *Black* v. *Ballerat*, 29 L.J. Q.B. 261.

charged at Valparaiso. At Valparaiso she took in goods belonging to the freighter, and also to other merchants for Paita (a port between Valparaiso and Guayaquil) and Guayaquil, part of which was to be discharged there, and the rest to be carried to England. The seventy running days were all consumed at Pernambuco, Valparaiso, Paita and Guayaquil, plus three days for which demurrage was paid to the master. It was held that the seventy running days "for loading, discharging, and reloading," only applied to the ports of loading, intermediate discharge, and reloading, such lay days not applying to the ultimate discharge at the end of the voyage, and, consequently, that the charterers were entitled to a reasonable time for unloading the homeward cargo in London, without paying demurrage.[n]

[n] *Sweeting* v. *Darthez*, 2 C.L.R. 1375.

CHAPTER V.

CESSER CLAUSES.

Cesser Clauses.

Lien and Exemption Clause.

Charters, especially those made by English agents for foreign principals, frequently contain a clause to the effect that the charterer's liability shall cease on shipment of the cargo. This clause, known as the "lien and exemption clause," or "cesser clause," is usually inserted in consideration of the granting to the shipowner of a lien, which he would not otherwise possess, on the cargo for demurrage and dead freight. The tendency of the Courts is to hold that the exemption granted to the charterer is co-extensive with the lien conferred on the shipowner.

In *Clink* v. *Radford*,[a] an action was brought by shipowners against charterers for damages for detention at the port of loading. The defendants relied on the cesser and lien clauses as freeing them from responsibility. It was held that the word "demurrage" in the lien clause did not cover undue detention at the port of loading, and therefore that the charterers were not exempted from liability. Where it is possible the cesser and lien clauses should be construed as co-extensive.[b]

Where therefore no lien at all has been granted to the shipowner, the Courts have been slow to relieve

[a] 29 W.R. 355.

[b] See also *Hansen* v. *Harrold* (1894), 1 Q.B. 612; *Dunlop* v. *Balfour* (1892), 1 Q.B. 507, and especially judgment of Wright, J.; *Grey* v. *Carr* (1871), L.R.C. Q.B. p. 544; *French* v. *Gerber* (1877), 2 C.P.D. p. 250.

the charterer from liabilities arising either before or after the shipment of the cargo; but, where the words make it clear that such was the intention of the parties, they have held the charterer relieved, even though the effect of such a decision was to leave the shipowner without remedy. Similarly, where a lien has been granted to the shipowner, the Courts have held the charterer excused from claims for which the shipowner has a lien, or some other security on the cargo, but have treated him as liable for claims for which the shipowner has no such lien, or which the express words of the clause show that he was intended to be liable for. The fact that the charterer is also the consignee of the cargo will not destroy his exemption under such a clause, unless he is consignee under a bill of lading incorporating and so reviving the liabilities of the charter, when the cesser clause will be held inapplicable to the new contract as regards liabilities accruing after the shipment of the cargo.

By a charter-party between plaintiff and defendant it was agreed that plaintiff's ship should, with all convenient speed, proceed to Sunderland, and that defendant should there load the ship in regular turn with a full cargo of coals, and the ship should proceed with it to Kiel, and deliver to freighter or assigns, on payment of certain freight; "and that, the charter being concluded by defendant on behalf of another party resident abroad, all liability of defendant should cease as soon as he had shipped the said cargo." It was held that this clause only exempted defendant from liability accruing after the loading of the cargo; and that he, therefore, remained liable for delay in loading, although he had ultimately loaded a full cargo.[q]

A memorandum for a charter-party made between plaintiffs, shipowners, and defendant, "as agent for the freighter" (no principal being named), after providing for "demurrage over and above the said lying days at £7 per day," stated that "it is further agreed that this charter being concluded by" defendant "for another party, the liability of the former in every

[q] *Christoffersen* v. *Hansen*, 1872, L.R. 7 Q.B. 509.

respect, and as to all matters and things, as well before as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo." It was held that the defendant was not liable, upon this memorandum, for demurrage at the port of discharge.[r]

By a later case, *Milvain* v. *Perez*[s] it was agreed by a charter-party made between plaintiffs, shipowners, and defendants, agents in England for foreign charterers, that as defendants were acting for foreign principals, "all liability of" defendants, "in every respect, and as to all matters and things, as well before and during as after the shipping of the said cargo," should "cease as soon as they" had "shipped the cargo." Defendants having loaded and shipped the agreed cargo, plaintiffs afterwards sued them for not having shipped it in regular turn. It was held that the action would not lie, for that the charter-party limited defendants' liability to the actual shipment of the cargo, and protected them from responsibility for any irregularity or delay in the shipment.

By a charter-party between a shipowner and a broker as agent for an unnamed principal, it was agreed that "fourteen days were to be allowed for loading in the Tyne, or the captain to receive £25 per day for demurrage day by day." And as to unloading, "one working day per keel and a half, etc., demurrage on and above the said lying days at £5 per day." Then came this clause:—"The charter-party being concluded by L. on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and master agreeing to rest solely on their lien on the cargo for freight and demurrage." It was held that the liability of the agent having attached for demurrage in the Tyne, was not absolved by this clause, which meant that the future liability only of the agent should cease for what might occur after the vessel was loaded.[t]

Where a charter-party provides that all liability on the part of the charterer is to cease on the completion of the loading, the master being given a lien on the cargo for demurrage, the shipowner has no further

[r] *Oglesby* v. *Yglesias*, 1858, E.B. & E. 930.
[s] 1861, 3 S. & E. 495. [t] *Pederson* v. *Lotinga*, 1857, 28 L.T.O.S. 267.

right of action if he neglects to enforce his lien. In such a case it makes no difference in principle that the consignee is the authorised agent of the charterers and consignors, who are exporting for their own use.[u]

A charter-party provided:—"Charterer's liability to cease as soon as the cargo is shipped in terms of this charter, captain having an absolute lien on the cargo for all freight, dead freight, and demurrage." It was held by the Court of Session of Scotland that as soon as a cargo had been shipped no liability could be enforced against the charterers, and that a claim would not lie against them for demurrage at the port of loading incurred before the loading was completed.[v]

In *Francesco* v. *Massey*,[w] a charter-party made by plaintiff to defendant contained the following clause:—"Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." In an action brought for demurrage at the port of loading, it was held (1) that the lien extended to demurrage at the port of loading, as well as at the port of discharge; (2) that the ship having been loaded, the charterer could not be sued for demurrage incurred during the loading.

In *Kish* v. *Cory*,[x] Lord Coleridge C.J. said:—"I accept *Francesco* v. *Massey* as a binding authority. *Bannister* v. *Breslauer*,[y] which was referred to in the argument, was an action on a charter-party, in which no days for demurrage were specified, but it contained a clause that the charterer's liability should cease upon shipping the cargo, provided the same should be worth the freight on arrival at the port of discharge, the captain having an absolute lien on it for demurrage. A delay having occurred in loading, the shipowners sued the charterers. The Court of Common Pleas in effect held that as the lien for demurrage could there apply only to detention, as distinguished from demurrage, properly so-called, the charterers were exempt from liability. The reasoning on which this case was decided has been questioned, and perhaps on strict examination does not appear perfectly accurate; but

[u] *Sanguinetti* v. *Pacific Steam Navigation Co.*, 1877, 25 W.R. 150.
[v] *Salvesen* v. *Guy*, 13 Ct. of Sess. Cas. (4 ser.), 85.
[w] 1873, L.R. 8 Ex. 101. [x] 1875, L.R. 10 Q.B. 558. [y] L.R. 2 C.P. 497.

it seems to me that the decision itself was perfectly right, and upon a charter-party containing a similar provision, I should be prepared to adhere to *Bannister* v. *Breslauer*. Hereafter a question may arise as to the construction of a charter-party framed like the one before us, when the shipowner sues, not for demurrage properly so-called, but for unliquidated damages for detention at the port of loading, and when the charterer relies upon the clause exempting him from liability. It will be necessary, then, to consider whether demurrage includes detention. I am inclined to think that, even in that case, it will be held that the charterer's liability ceases on loading, and the lien attaches."

In *Gullischen* v. *Stewart*,[a] a charter-party contained stipulations in the usual form for payment of freight and demurrage, and also a stipulation that "as this charter-party is entered into by the charterers for account of another party, their liability ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." The charterers having placed the cargo on board at the port of loading, a bill of lading was signed whereby the goods were made deliverable to themselves at the port of discharge, "they paying freight and all other conditions as per charter-party." In an action by the shipowner against them as consignees of the cargo, for demurrage in respect of delay at the port of discharge, it was held by the Court of Appeal that the cesser clause in the charter-party must be rejected inapplicable in reading the bill of lading, which incorporated all the conditions of the charter-party applicable to the reception of the goods at the port of discharge, and therefore that the plaintiff was entitled to maintain the action.[b]

By a charter-party, by which a ship was chartered at a lump freight for carriage of a cargo of oats from New Zealand to London, it was provided that the charterers might recharter the ship at any rate of freight without prejudice to the charter-party, the captain to sign bills of lading according to the custom

[a] 13 Q.B.D. 317.

[b] See *Sanguinetti* v. *Pacific Steam Navigation Co.*, 1877, 2 Q.B.D. 238.

of the port at the current or any rate of freight required without prejudice to the charter-party. The charter-party contained a clause by which the liabilities of the charterers were "to cease on the vessel being loaded, the master and owners having a lien on the cargo for all freight and demurrage under this charter-party." The charterers rechartered the ship. Under the sub-charter a cargo of oats was shipped, and a bill of lading given, by which freight was payable in London at a certain rate per ton on the weight of the cargo as delivered. By reason of a diminution in weight of the cargo during the voyage, the amount of the bill of lading freight, for which the shipowner had a lien, did not wholly cover the amount due for lump freight under the charter-party. The shipowner sued the charterers to recover the difference. The Court of Appeal held, on the authority of *Clink* v. *Radford*,[b] that the cesser clause only relieved the charterers from liability to the extent to which the shipowner had obtained a lien for the freight on the cargo, and, therefore, the charterers were liable.[c]

By a charter-party made with the defendant, plaintiff's ship was to proceed to W., and there load a cargo "in the customary manner," and proceed to R. and deliver, "the cargo to be discharged in ten working days (weather permitting), commencing, etc. Demurrage at £2 per 100 tons reg. per day. . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship." The customary rate of loading at W. was proved to be twenty tons a day. It was held that the clause for lien and for exemption of the charterer applied only to demurrage at the port of discharge, not to damages at the port of loading.[d]

In *Gardiner* v. *Macfarlane*[e] a charter-party provided "charterer's responsibility to cease on cargo being

[b] (1891), 1 Q.B. 625.

[c] *Hansen* v. *Harrold*, 1894, 1 Q.B. 612. See also *Lister* v. *Haansbergen*, 1876, 1 Q.B.D. 269.

[d] *Lockhart* v. *Falk*, 1875, L.R. 10 Ex. 132. See also *Dunlop* v. *Balfour* (1892), 1 Q.B. 507; *Anderson* v. *English Co.* (1895), 1 Com. Cas. 85; *Janentsky* v. *Langridge*, 1895, 1 Com. Cas. 90.

[e] 1889, 16 Ct. of Sess. Cas. (4 ser.) 658.

loaded, provided the cargo is worth the freight, at port of discharge. Owners to have lien on cargo for freight, dead-freight and demurrage. To be loaded as customary at Sydney. To be discharged as customary etc. . . . and at the rate of not less than 100 tons of coal per working day . . . and ten days on demurrage over and above the said lying days at 4s. per register ton per day." In an action brought by the owners against the charterers for damages for detention at the port of loading, the defendants maintained that the cesser and lien clauses freed them from responsibility. It was held that the word "demurrage" in the lien clause did not cover undue detention at the port of loading, and therefore that the charterers were not exempted by the cesser clause from liability for damages for such detention.

Lord Esher's interpretation of cesser and lien clauses.

In *Kish* v. *Cory*,[f] Lord Esher thus stated his view:—"I am inclined to think that the interpretation to be adopted at the present day is that the charterer's liability for past breaches is to cease upon loading the cargo, but the remedy of the shipowner is given against the consignees to the extent of his" (the shipowner's) "remedy against the charterer; that is to say, the lien is given in full for all breaches for which the shipowner would, but for this clause, have had a remedy against the charterer." His lordship added further on (p. 560):—"I feel certain that, when the occasion arises, it will be held, upon a clause like this, containing a cesser of liability of the charterer and a lien for demurrage, that 'demurrage' includes not only demurrage proper, but also that which is in the nature of demurrage—viz., detention at the port of loading. This will make the contract just and reasonable, and it may be fairly held that the parties contemplated this construction."

Lord Esher's Rule.

Lord Esher, who delivered the considered judgment of the Court in *Gerber* v. *French*,[g] went through all the earlier cases, and then summed up the result as follows:—"The inclination of many of the judges, in face of the increasing number of such charter-parties

[f] 1875, L.R. 10 Q.B. p. 550.
[g] 1877, 1 C.P.D. p. 744.

made in the ordinary course of business, seemed to be to extend the lien rather than to diminish that solution. In all cases, then, it will be seen, the dispute has been as to the extent of that solution in respect of liabilities accruing before the loading. In every case it has been assumed or expressly declared that it is complete as to liabilities which might otherwise accrue after the loading. The words of this clause must necessarily absolve from all future liability, or mean nothing. The rule, therefore, seems to be that where the words of the absolving part of the clause plainly show that all liability is to cease on loading, it is to cease both as to antecedent and future liabilities, and without regard to any lien; but where the words of the absolving part are open to either interpretation, then, without regard to lien, liability as to future transactions is not to accrue, but liability as to antecedent breaches is to cease only so far as an equivalent is given."

In a later case—that of *Restitution S.S. Co.* v. *Pirie*[h] —the clause ran:—"The charterer's liability under this charter-party to cease on the cargo being loaded and the advance freight paid, the owners to have lien on the cargo for the balance of the freight and demurrage." Mr. Justice Cave said that, although he did not exactly know that the point had ever been actually disposed of, *Kish* v. *Cory*, *Sanguinetti* v. *Pacific Steam Navigation Co.*, and *Harris* v. *Jacobs* were abundantly sufficient authority to warrant him holding that this cesser clause applied to demurrage, whether it was a claim for demurrage proper or a claim for damages for detention in the nature of demurrage, and relieved the defendants from liability.

In Scotland, however, in the same year, an opposite view of the effect of the English decisions on the lien and cesser clauses was adopted, and it was held that a lien for demurrage did not cover damages for detention, and that consequently a charterer was liable in an action for such detention, and was not relieved by a cesser clause.[i]

And in 1891, in *Clink* v. *Radford*, the Court of Appeal arrived at the same result. A cargo of coal

[h] 1889, 6 Asp. M.C. 418.
[i] *Gardiner* v. *Macfarlane* (1889), 16 Ct. of Sess. Cas. (4 ser.) 658.
1891, 1 Q.B. 625.

was to be loaded in the usual and customary manner, and to be discharged at the rate of 100 tons per working day, subject to certain exceptions. No rate of demurrage was mentioned with respect to the port of loading; but, if the cargo was not discharged at the agreed rate, the charterers were to pay "demurrage" at the rate of 4d. per ton. Further, the charterer's liability under the charter was "to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage." The ship was detained improperly at the port of loading, and the shipowners claimed from the charterers. It was held that they were liable; for the lien for demurrage did not extend to damages for the improper detention, and therefore the cesser clause did not terminate the charterers' liability for those damages.

The Court considered that the lien for "demurrage" cannot cover damages for detention at the port of loading when the charter-party does not fix the rate of demurrage at that port, partly because there is then no "demurrage" to which the detention there can be regarded as analagous; and partly because there is no guide to the amount of his damages, and a construction which gives a lien for unascertained sums is to be avoided.

Dunlop v. *Balfour*[j] was similar to *Clink* v. *Radford*, except that the charter-party there fixed a rate of "demurrage" which was apparently applicable to both the loading and discharging ports. And here, again, the Court of Appeal held that the liens expressly given for "demurrage" did not cover a claim for detention at the loading port, on the ground that there was no time fixed for the loading, whereas there was a time fixed for the discharging; and therefore that the provisions of the charter-party with regard to demurrage only applied to the latter port.

"In my opinion, demurrage is more applicable to a delay after a time expressly fixed than to a delay after a time which is only implied as reasonable. That rule underlies the construction put on a similar clause in *Lockhart* v. *Falk*,[k] and is, in my opinion, a reason-

[j] 1892, 1 Q.B. 507. [k] L.R. 10 Ex. 132.

able one. If this is the correct view, the words as to demurrage in this charter-party relate only to the port of discharge."[l]

Result of Cases.

The result of the cases seems to be that, where it plainly appears from the words of the cesser of liability clause that the parties intended that all liability, whether antecedent[m] or future,[n] shall cease or be extinguished on loading, the charterer, on the performance of this condition, will be absolved, whether a lien on the cargo be substituted for his liability or not.[o] But where the language of the cesser clause is ambiguous, there is some doubt as to whether the charterer is released from future liability in the absence of a lien on the cargo being substituted. Lord Esher, with the concurrence of Mr. Justice Archibald and Lord Justice Lindley, said, in *French* v. *Gerber*,[p] that the charterer would be released in these circumstances; while, in the Court of Appeal, Lord Justice Mellish[q] seems to have thought that the Court might infer that the parties did not intend to completely exonerate the charterer where his release from future liability was plainly not covered by a lien. Lastly, the charterer's liability for an antecedent breach is only extinguished on loading, by an ambiguous cesser clause, so far as a lien is given in substitution for it.[r] To put it in other words, where no lien is given, the charterer is liable for demurrage and detention at port of loading. Whether a lien be given or not, the cesser clause relieves the charterer from liability for defaults after the cargo is loaded.[s]

Charterer may be liable in spite of Cesser Clauses.

The judgments of the Lords Justices in *Hansen* v. *Harrold*[t] would seem to lead to the conclusion that the charterer remains liable, in spite of the ordinary cesser clause, for all claims of the shipowner under the charter-party, whether accrued before or after the loading, unless the shipowner has an effectual lien upon the cargo for those claims.[u]

[l] Per Fry, L.J. (1892), 1 Q.B. p. 529.
[m] *Milvain* v. *Perez* (1861), 30 L.J. Q.B. 90.
[n] *Oglesby* v. *Yglesias* (1858), 58 L.J. Q.B. 356.
[o] See per Ld. Esher, *French* v. *Gerber* (1877), 1 C.P.D. 744.
[p] 1877, 1 C.P.D. 744. [q] 2 C.P.D. 250.
[r] *Clink* v. *Radford* (1891), 1 Q.B. 625; *Christoffersen* v. *Hansen* (1872), L.R. 7 Q.B. 509.
[s] Abbott on Merchant Shipping, 1901, pp. 460, 461.
[t] 1894, 1 Q.B. 612.
[u] See further, *Williams* v. *Canton Ins. Co.* (1901), A.C. 462.

In *Burrill* v. *Crossman*[y] a charter-party provided that the vessel should be discharged at a specific rate per day; that for each day of detention a specified demurrage should be paid; that bills of lading should be signed as presented, without prejudice to the charter; that the vessel should have an absolute lien upon the cargo for freight and demurrage; and that the charterer's liability should cease when the vessel was loaded and bills of lading signed. The charterers presented, and the master signed, bills of lading providing for paying freight, but making no reference to the provisions of the charter in regard to demurrage; and these bills were at once transferred. The discharge of the cargo was delayed, without fault of the consignees, and the owners brought an action against the charterers for the stipulated demurrage. It was held that the provision in the charter for cesser of the charterers' liability applied only so far as the lien provided by the charter was commensurate with the charterers' original liability; and they, having under the clause providing for signing bills of lading, presented bills which imposed no liability on the transferers for the demurrage stipulated in the charter, remained liable to the owners for such demurrage. It was held, further, that the charter, by stipulating the rate of discharge, having fixed definitely the time for its completion, the charterers were liable for delay beyond that time, though caused by the acts of the public enemy, and without fault of the charterers or consignees. Where the charter-party provides that demurrage should be payable "for each day of detention by default of the charterers or their agents," the word "default" means an omission or neglect to perform the contract.

Bills of Lading making no reference to Demurrage.

[y] 1895, 69 Fed. Rep. 747.

CHAPTER VI.

Liability Under Bills of Lading.

Consignee when liable for demurrage.

Although a charterer may contract to load or discharge a ship in a given time, it does not follow that a shipowner can, in all such cases, enforce that contract against the consignees or the person who receives the cargo, so as to recover demurrage or damages for detention, even when that detention has been incurred at the port of discharge.

Liability for demurrage or detention under bill of lading.

There may be liabilities to pay for the detention of a general ship, arising out of the bill of lading contracts, just as there are for the detention of chartered ships. And, where the ship has been chartered, but the goods have been shipped under bills of lading given to or endorsed to strangers, important questions arise as to the liability of the holders of the bills of lading for demurrage. Bills of lading do not generally contain any provision as to the time in which the goods are to be discharged, unless the ship is under charter. Where that is the case, however, the terms of the charter-party on the point are frequently incorporated by a reference to them. And, subject to what may be expressed in the bill of lading, it is in all cases implied in it that the shipper, or his consignee or assign, will be reasonably diligent in receiving the goods.*

By a charter-party entered into between the plaintiff and G., it was agreed that the plaintiff's vessel should, at the port of discharge, be unloaded as fast as the

* Carver on Carriage by Sea, p. 770, sect. 635.

custom of the port would allow. By the bill of lading signed by the master, the cargo was stated to have been shipped by G., and was to be delivered to the defendant or his assigns, he or they paying freight for the goods as per charter-party. No time for the discharge of the cargo was mentioned in the bill of lading. At the port of discharge there was no custom as to unloading vessels, but a delay occurred in unloading the ship. The defendant never assigned the bill of lading, but before the arrival of the ship he sold the cargo, and the ultimate purchase took delivery of it upon an order signed by the defendant. The Court of Appeal held (1) that as there was no custom of the port of discharge as to unloading vessels, the charter-party did not by its terms vary the implied contract contained in the bill of lading to deliver the cargo within a reasonable time; and (2) that the defendant, although he had parted with the beneficial interest in the cargo, was when the delay occurred a "consignee" within the Bills of Lading Act 1855.[x]

Where bill of lading fixes a time.

If the bill of lading fixes a period within which the goods are to be discharged, then, as in the case of charter-parties, the person is responsible for the performance of that contract takes the risk of any delays which may prevent the ship's discharge, and must have his goods out of the ship within the time stated—always, however, excepting delays which are due to the acts or defaults of the shipowner, or his agents. If no time is fixed by the contract, but the implied duty of the merchant is relied upon, the question is, has he been reasonably diligent in taking his goods, having regard to the circumstances under which the discharge has in fact taken place?[y]

Ambiguous Charter-party words struck out.

In construing an ambiguous charter-party, the fact that certain words which were in the printed form of the charter-party, have been struck out is a matter which may be taken into consideration.[z]

Bills of lading incorporating conditions of Charter-party.

It thus becomes necessary to see what words in a bill of lading will enable the shipowner to recover from the receiver of cargo demurrage for which he has

[x] *Fowler* v. *Knoop*, 1878, 4 Q.B.D. 299.
[y] Carver, on Carriage by Sea, p. 771, sect. 636
[z] *Rowland S.S. Co.* v. *Wilson, Sons & Co.*, 1897, 2 Com. Cas. 198.

stipulated in his charter-party. The acceptance of a cargo by the indorsee of the bill of lading whereby the goods were deliverable to order "against payment of the agreed freight and other conditions as per charter-party," is a circumstance from which the jury may imply a contract on his part to pay demurrage stipulated for by the charter-party, notwithstanding his refusal at the time of receiving the goods to pay the demurrage.[a]

Similar language was held to bind the consignees in *Porteus* v. *Watney*[b] for demurrage incurred at the port of discharge.

Consignee's liability for detention.

A consignee who receives goods under a bill of lading which makes them deliverable to him on his "paying for the said goods as per charter-party," does not become impliedly liable to pay demurrage, according to the charter-party, for a detention of the ship at the port of loading, which occurred before the bill of lading was signed.[c]

In *County of Lancaster Steamship* v. *Sharp*,[d] goods were shipped on board the plaintiffs' vessel under a bill of lading, under which the defendants were named as consignees. The property in the goods had not passed to the defendants by reason of the consignment within the meaning of the Bills of Lading Act, 1855, and they were, and were known by the plaintiffs to be acting as agents. By the bill of lading the cargo was to be delivered on payment of freight "and other conditions as per charter-party." By the charter-party demurrage was payable, and the plaintiffs had a right of lien in respect thereof. Before the arrival of the vessel at the port of discharge the plaintiffs informed the defendants that demurrage was payable in respect of delay at the port of loading. The defendants refused to pay demurrage, but paid the freight and took delivery of part of the cargo, the plaintiffs exercising their lien for demurrage over the residue. It was held by Mathew J. that there was no evidence of a contract on the part of the defendants to pay

[a] *Wegener* v. *Smith*, 1854, 15 C.B. 285.
[b] 1878, 3 Q.B.D. 534.
[c] *Smith* v. *Sieveking*, 1855, 24 L.J. Q.B. 257.
[d] 1889, 24 Q.B.D. 158.

demurrage. His lordship referred to the remarks of Jervis C.J. in *Smith* v. *Sieveking*. Jervis C.J. said[e]:—"In *Jesson* v. *Solly*[f] and in *Wegener* v. *Smith* (*supra*) the indorsee of a bill of lading was held liable for demurrage accruing from his own delay in the port of discharge, and under different words in the bill of lading from those of *Smith* v. *Sieveking*." His lordship also said:—"Had it been proved that any part of the cargo was received by the defendants on the terms of the bill of lading, there would, in my opinion, have been ample evidence of a contract on their part to pay demurrage. But, so far from this being the case, it appears that they took delivery on the express understanding that they agreed to pay freight, but did not agree to pay demurrage."[g]

In *Gray* v. *Carr* the judges of the Court of Exchequer Chamber differed in opinion as to whether a bill of lading containing the words, "he or they paying freight and all other conditions or demurrage (if any should be incurred) for the said goods as per the aforesaid charter-party" rendered the receiver of the cargo liable for demurrage incurred at the port of loading. Lord Esher, with whose judgment Mr. Justice Willis concurred, thought it did not, and he cited[h] in support of his views the following passage from the remarks of Baron Parke in *Smith* v. *Sieveking*, who said[i]:—"In this case you must contend that the consignee at the port of discharge contracted to pay for the antecedent delay of the charterer, which occurred at the port of loading before the consignee had anything to do with either ship or goods. Such a contract is one which requires strong evidence to support it; for it is, to say the least, not a reasonable one." The majority of the Court, however, in *Gray* v. *Carr* held the bill of lading gave the plaintiff the lien on the cargo for demurrage given by the charter-party.

In the subsequent case of *Porteus* v. *Watney*[j] Lord Esher thus stated the effect of *Gray* v. *Carr*:—"I endeavoured in *Gray* v. *Carr* to give what I thought a reasonable interpretation to those words, 'and all

[e] 5 E. & B. 591.
[f] 4 Taunt. 52.
[g] 1871, L.R. 6 Q.B. 522.
[h] 1871, L.R. 6 Q.B. p. 538.
[i] 1855, 5 E. & B. At. 590.
[j] 1878, 3 Q.B.D. 541.

other conditions as per charter party,' but my interpretation was not accepted by the majority of the Court. I take the decision in *Gray* v. *Carr* to have been that those words in a bill of lading are to be treated as words of reference to the charter-party, and that they therefore introduce into the bill of lading every condition that is in the charter-party by way of reference; so that they bring into the bill of lading every condition of the charter-party in its terms, and make every one of those conditions part of the bill of lading, as if they had been originally written into it. But then there is another rule which applies, which is, that if taking all the conditions to be in the bill of lading, some of them are entirely and absolutely insensible and inapplicable, they must be struck out as insensible; not because they are not introduced, but because, being introduced, they are impossible of application."

But as we have seen in *County of Lancaster S.S. Co.* v. *Sharp* (*supra*), where the defendants took delivery of the cargo, on the express understanding that they agreed to pay freight, but did not agree to pay demurrage, it was held that "other conditions as per charter-party," did not render the defendants liable for demurrage incurred at the port of loading, as they had not received the cargo on the terms of the bill of lading.

In *Smith* v. *Sieveking*[k] it was held by the Exchequer Chamber affirming the Queen's Bench that the words, "he or they paying for the said goods as per charter-party," did not render the consigner liable for demurrage incurred at the port of loading. And in *Young* v. *Moller*[l] Baron Parke said:—"The case of *Sanders* v. *Vanseller*[m] settles the law on this point, that no obligation to pay the freight arises in point of law from the receipt of the goods under the bill of lading, but that such receipt by the indorsee of the bill of lading is reasonable evidence from which a jury may infer a contract by him to pay it, the consideration for the contract being that the captain has given up his

[k] 1855, 5 E. & B. 589. [l] 1855, 25 L.J. Q. B. 96
[m] 1843, 4 Q.B. 260.

lien on the cargo." He also stated that in the particular case the conduct of the defendants negatived any agreement to pay freight until the entire cargo had been delivered; and that there was no evidence of any agreement to take the cargo in a reasonable time. In the latter remark the other judges concurred; as, however, the captain had improperly refused to give delivery until he received the freight, the question whether there was an obligation to take delivery in a reasonable time does not seem to have arisen.

In an action for demurrage against the assignee of a bill of lading, where the vessel was detained at her port of discharge beyond the days for unloading allowed by the charter-party, the evidence was that the bill of lading made the goods deliverable to the assignee on his paying freight according to charter-party; and that in the margin of each bill of lading was the following:—"There are eight working days for unloading in London." It was held that the defendant was not liable, as there was no intimation in the bill of lading that the person receiving the goods thereunder was to pay demurrage.[n] Chief Justice Erle said it was very important that an assignee when he took a bill of lading should see from the instrument itself the liability he incurs. Mr. Justice Willis, after referring to earlier decisions to show that the clause in the body of the bill of lading was insufficient to charge the consignee with demurrage, said the note in the margin was as consistent with the owner of the vessel looking for payment of demurrage to the charterer as to the consignee under the bill of lading.

Personal liability of indorsee.

When the bills of lading are in the hands of strangers to the charter-party, either as original shippers or as indorsees to whom the property has passed, they show the contract under which the goods are being carried; and the shipowner's claims, exemptions, and liens on the cargo, given by the charter-party are not preserved as against such shippers or indorsees, except so far as those terms of the charter are expressly incorporated in the bill of lading.

In *Oliver* v. *Muggeridge*[o] the charter-party provided for the payment of freight, and allowed thirty days for

[n] *Chappel* v. *Comfort*, 1862, 31 L.J. C.P. 58
[o] 7 W.R. 164.

loading and unloading; the bill of lading provided for the payment of freight as per charter, and made no reference to demurrage. It was held that an indorsee of the bill of lading was not liable for demurrage.

All other conditions as per Charter.

Reference to the charter-party is very commonly made in the bill of lading by expressing that the goods are to be delivered on payment of the freight, "and all other conditions as per charter-party," and there have been several cases as to what terms of the charter are imported by these words. The context in each case must be looked at, but the general result of the cases is that the words mean all those conditions of the charter-party which are to be performed by the consignee of the goods, or which relate to the mode of delivery to him by the shipowner. In *Serraino* v. *Campbell*[p] the Court of Appeal held that the words, "all other conditions as per charter," did not incorporate into the bill of lading the exception of "stranding occasioned by the negligence of the master," and that the shipowners were liable to the plaintiffs who were indorsees of the bill of lading, but strangers to the charter-party for the loss of the goods. In *Russell* v. *Niemann*[q] it was held that they did not import into the bill of lading an exception of perils which appeared in the charter-party but not in the bill of lading. In *East Yorkshire S.S. Co.* v. *Hancock*[r] goods forming part of a cargo loaded under a charter-party of the plaintiffs' ship, were to be shipped under a bill of lading to be delivered to the order of M. or assigns, "he or they paying freight for the goods . . . all other terms, conditions, and clauses as per charter-party." The charter-party contained the following clause:—"The ship to discharge in such berth or dock as ordered by charterers or their agents." On the arrival of the ship at the port of discharge the defendant, the indorsee of the bill of lading, he being also the charters' agent, ordered her to discharge in a certain dock, but she discharged in a different dock from that ordered, whereby the defendant suffered damage. It was held that the clause in the charter-party was incorporated into the bill of lading, and that

[p] 1891, 1 Q.B. 283. [q] 17 C.B.N.S. 163.
[r] 1900, 5 Com. Cas. 266.

the plaintiffs were liable to the defendant for the damage suffered by him.

Liability of Consignor.

In *Cawthron* v. *Trickett*[s] goods were consigned under a bill of lading by which it was stipulated that the vessel should take her regular turn in unloading. The vessel having been prevented from unloading within a reasonable time in consequence of not being allowed to take her regular turn in unloading. It was held that the master could sue the consignor for damages for such detention, the above stipulation in the bill of lading amounting to a contract by the consignor with the master that the vessel should take her regular turn in unloading.[t]

A party hired sacks from a railway company for the conveyance of grain on their railway subject to certain regulations, amongst which were the following:— "(2) The charges for the use of sacks will be a halfpenny per sack per journey when discharged at any of the company's stations on the company's line, or at their warehouses, or at warehouses or mills connected by rail with the company's line, and 1d. per sack when sent to foreign stations. (3) Demurrage of a halfpenny per sack per week will be charged after the expiration of fourteen days, the time to commence from the time the sacks leave the station to be filled; the time allowed for filling and returning to the station to be seven days. (10) None of the company's sacks containing grain will be allowed to leave any station, local or foreign, unless a guarantee is first obtained by the clerk in charge from the consignee that the grain will be immediately discharged, and the sacks returned the same day and to the station. It was held that the company's claim for demurrage arose at the expiration of fourteen days from the hire of the sacks, and that the only person with whom there was any contract for demurrage was the consignor, by virtue of the third regulation; but that by the operation of the tenth regulation, his liability ceased upon the company's permitting the sacks to get into the hands of the consignee whether with or without a guarantee.[u]

[s] 1864, 33 L.J. C.P. 182.
[t] See *Dickinson* v. *Lano*, 1860, 2 F. & F. 188.
[u] *G.N.Ry.* v. *Wyles*, 2 C.B.N.S. 344.

Liability of Consignees.
Bills of Lading Act, 1855.

By the Bills of Lading Act, 1855, consignees or indorsees of the bill of lading to whom the property in the goods passes, are made liable as though the contract had been made with them. But before the passing of that Act, it was held that an implied promise might arise, on the part of one who received the goods under the bill of lading to perform its terms, and amongst others those relating to demurrage.[v]

Cave J. said in *Allen* v. *Coltart*[w]—"When the bill of lading stipulated on the face of it for the payment of demurrage, it was held that the taking of the goods under it by the indorsee was evidence of an agreement to pay the demurrage. *Stindt* v. *Roberts*.[x] This case is explained by Parke B. in *Young* v. *Moller*[y] as establishing that the receipt of the cargo by an indorsee of the bill of lading is evidence of an agreement to be bound by its terms, whatever they may be. Thus in *Wegener* v. *Smith*[z] it was held that the acceptance of a cargo by the indorsee of the bill of lading, whereby the goods were deliverable to order 'against payment of the agreed freight and other conditions as per charter-party,' was a circumstance from which the jury might imply a contract on his part to pay demurrage stipulated for by the charter-party, notwithstanding his refusal at the time of receiving the goods to pay the demurrage. This case was expressly approved and followed in *Porteus* v. *Watney*[a]. . . . It seems to me that if the holder of a bill of lading under which he is entitled to the delivery of the goods on certain terms, presents that bill of lading and demands delivery of the goods, he thereby *prima facie* offers to perform those terms of the bill of lading on which alone the goods are deliverable to him."

In *Benson* v. *Hippins*[b] the agent of the consignees of a cargo wrote to the owner, agreeing to pay freight, demurrage, etc., and to place himself in every respect in the place of the charterer. The ship was detained

[v] *Jesson* v. *Solly*, 4 Taunt. 52; *Evans* v. *Forster*, 1 B. & Ad. 118; *Smith* v. *Sieveking*, 5 El. & Bl. 589; *Scotson* v. *Pegg*, 6 H. & N. 295; *Stindt* v. *Roberts*, 5 D. & L. 460; *Wegener* v. *Smith*, 15 C.B. 285; *Chappell* v. *Comfort*, 10 C.B.N.S. 802; *Allen* v. *Coltart*, 11 Q.B.D. 782a; *Palmer* v. *Zarifi*, 37 L.T. 790; *Dobbin* v. *Thornton*, 6 Esp. 16; *Leer* v. *Yates*, 3 Taunt. 386; *County of Lancaster S.S. Co.* v. *Sharpe*, 24 Q.B.D. 158.

[w] 11 Q.B.D. p. 788. [x] 5 D. & L. 460. [y] 2 El. & Bl. 755.
[z] 15 C.B. 285. [a] 3 Q.B.D. 534. [b] 4 Bing. 455.

beyond the time allowed by the charter-party in loading and unloading, and the demurrage days and several days besides elapsed after the date of the agent's agreement. It was held that he was liable for the detention beyond the demurrage days, as well as for the demurrage on his agreement, as there was a sufficient consideration moving from the owner to the agent, since he could not sell the cargo without the owner's consent. But in *County of Lancaster S.S. Co.* v. *Sharpe*[c] the defendants, who were acting as forwarding agents only before taking delivery of any part of the cargo, refused to pay the demurrage, and were therefore held not liable.

In *Moeller* v. *Young*[d] it was held that the demand of delivery, and receipt of part of the cargo, by assignees of a bill of lading for the whole cargo, was no evidence by them to take the cargo in a reasonable time. But in *Palmer* v. *Zarifi Bros.*[e] a charter-party stipulated that the agreed freight should be paid on right and true delivery of cargo, and that the discharge at the port of delivery should be done in accordance with the usage of the discharging port. The defendants were endorsees of the bills of lading, which were expressed to be subject to the conditions of the charter-party, and contained the following clause:—"The goods to be taken from the ship by the consignees immediately they come to hand in discharging the ship, otherwise they will be landed or put into craft by the master or ship's agent (at the merchant's risk and expense), and either or both to have a lien on such goods until the payment of all costs and charges so incurred." In an action by the plaintiff for damages for detention of the ship by default of the defendants, the jury found that the ship was detained for two days beyond a reasonable time for unloading, and that the defendants held themselves out to the plaintiff as receivers of the cargo under the bill of lading, so as to lead the plaintiff to look to them as such. There was evidence that the defendants told the plaintiff's agent, before the ship arrived, that they had the cargo and would pay the freight, and that during the unloading the plaintiff's

[c] 24 Q.B.D. 158. [d] 25 L.J. Q.B. 94. [e] 1877, 3 Asp. M.C. 540.

agent complained daily to the defendants of their delay, telling them that there would be a claim for demurrage, without repudiation by them of liability. It was held by Lord Coleridge C.J. and Denman J. that there was evidence that the defendants undertook to pay for any reasonable delay, and that they took delivery under the provisions of the bill of lading.

In *Hill* v. *Idle*[f] it was held that the consignee of a particular parcel of goods by a general ship is liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity for an order from the Treasury to land these goods, which the consignee used the utmost diligence to obtain.[g]

Liability for Demurrage by each holder of Bill of Lading

It was held in *Leer* v. *Yates*[h] that each of the shippers was liable for demurrage. Lord Mansfield said that the shipowner may make a gain out of the detention "which may possibly much exceed what, in justice and conscience, he ought to have." In *Dobson* v. *Droop*[i] Lord Tenterden expressly ruled that the payment by one consignee did not affect the shipowner's claim against another.

And in *Porteous* v. *Watney*[j] Lord Esher said:—"I think that, if the consignee of a portion of the cargo had a bill of lading in the same words, and had been called upon to pay, and had paid, the whole demurrage to the shipowner, the holder of another bill of lading, if sued, could not set that up as a defence. That defence would arise in respect of a wholly independent contract between the shipowner and the holder of the other bill of lading. He could not set it up as a defence, because he would have no right to prove that other and wholly independent contract. I accept the proposition that it would be no defence for the owner of the bill of lading to say that the shipowner had been paid the same sum by all other holders of bills of lading for cargo in the ship. Therefore, I think that we are bound to follow the decision of *Leer* v. *Yates*."

But Thesiger L.J. doubted whether the opinion held by Lord Esher on the point was sound. He said:—

[f] 1815, 4 Camp. 327.
[g] See also *Fowler* v. *Knoop*, 4 Q.B.D. 299.
[h] 3 Taunt. 387. [i] M. & M. 441. [j] 3 Q.B.D. 543.

"Without taking upon myself to express an opinion upon a point which is not directly before us—especially in the face of the opinion of Brett L.J. (*i.e.*, Lord Esher) I must at least say that I do not think it altogether clear that when a bill of lading stipulates that a consignee under it is to have his goods on payment of freight and on the performance of all other conditions of the charter-party, and, in point of fact, all demurrage due under the charter-party has been paid to the shipowner by some other consignee under a similar bill of lading, so that the condition in the charter-party as to demurrage has been performed, although not by the particular consignee, that fact would not constitute in equity, if not at law, a defence to an action for demurrage brought against the first consignee."

Right of Master to sue

Erle C.J., in *Cauthron* v. *Trickett*,[k] said:—"I take it that a master may sue the consignor upon any contract in the bill of lading." But, in *Brouncker* v. *Scott*,[l] it was held that the master of a ship, not being owner, cannot bring an action upon an implied promise in the bill of lading to pay demurrage. And, in *Evans* v. *Forster*,[m] it was also held that the master who, by a bill of lading, has undertaken to deliver goods to the consignee on payment of freight, cannot maintain an action against the consignee on an implied contract to pay demurrage.

By a charter-party, containing the usual exceptions, freight was made payable on the unloading and right delivery of the cargo, which was to be provided by the charterers; the master was to sign bills of lading at the port of loading, and, upon the completion of the loading, the charterer's liability under the charter-party was to cease. The charterers having placed the cargo on board at the port of loading, bills of lading were signed by the master whereby the cargo was made deliverable to the shippers or their assigns at the port of discharge, "they paying for the same as per charter-party." In an action by the master against the charterers for freight, it was held by Bigham J. that the

[k] 33 L.J. C.P. 183.
[l] 4 Taunt. 1. [m] 1 B. & Ad. 118.

master, in signing the bills of lading, had done so merely as agent for the shipowner, and was therefore not entitled to maintain the action.[a]

Liability of Charterer for Demurrage.

The charterer is the person ordinarily liable for demurrage. And this liability continues in spite of the fact that other persons may also have become liable, whether as shippers or as holders of the bills of lading. Thus he continues liable to give proper orders as to the port of discharge, to pay the freight, to see that delivery of the cargo is taken in proper time or demurrage paid, etc. Unless, indeed, the shipowner has dealt with the bill of lading holders in a manner inconsistent with the charter-party.[b]

[a] *Repetto* v. *Millar's Karri and Jarrah Forests, Ltd.*, 1901, 2 K.B. 306.
[b] See *Erichsen* v. *Barkworth*, 28 L.J. Ex. 95, and *Bradley* v. *Goddard*, 3 F. & F. 638.

INDEX

LONDON:
PRINTED BY W. H. SMITH AND SON,
95 FETTER LANE, E.C.